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MAR 05 2008

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 63-32061 IN THE)	FINAL ORDER
NAME OF AVIMOR, LLC, FORMERLY)	
KNOWN AS SUNCOR IDAHO, LLC)	
_____)	

This matter is before the Director of the Idaho Department of Water Resources ("Director," "Department" or "IDWR") on exceptions to a recommended order for approval of the protested application for permit of applicant Avimor, LLC, formerly known as SunCor Idaho, LLC ("SunCor" or "Avimor"). The Director makes the following Findings of Fact, Conclusions of Law, and Final Order approving the application upon conditions as follows:

FINDINGS OF FACT

1. On January 25, 2005, SunCor submitted amended Application for Permit No. 63-32061 ("Application") seeking 5.0 cubic feet per second ("cfs") of ground water to be used year-round for municipal purposes at a planned development spanning Ada, Boise and Gem Counties. The Application remarks section states, "municipal use may also include seasonal aquifer recharge" and "[r]echarged water would be rediverted from the aquifer for municipal purposes under pending water right permit 63-31966." The Application did not include a request to obtain and hold water for reasonably anticipated future needs for a planning horizon associated with diversion and use of water under the Application.

2. The planned development community is primarily to be located northwest of Boise, Idaho in northern Ada County in Spring Valley ("Project"). The proposed points of diversion in the Application are located approximately four (4) to eight (8) miles west of the place of use. A pipeline will be constructed to convey water to the Project. Water diverted and conveyed to the Project under this right will be used in the proposed public water system either directly or following recharge and re-diversion under right 63-31966.

3. The Application proposes that water diverted for recharge be injected through injection wells located several miles east and north of the points of diversion proposed in the Application. The Department has approved three injection wells identified as Injection Well Permit Nos. 63W208001, 63W208002 and 63W208003.

4. On March 11, 2005, the Department issued Permit No. 63-31966 to SunCor authorizing the diversion of 5.0 cfs of ground water for municipal purposes to be diverted year-round from wells as part of the Project. Wells from Injection Well Permit Nos.

63W208001 and 63W208002 may be points of diversion described by Permit No. 63-31966. SunCor has obtained or has applied for other permit approvals associated with the Project and has started development work at the Project site.

5. In April and May of 2005, the Department published notice of the Application. Subsequently, beginning in May 2005, North Ada County Foothills Association, Rod Davidson, Lyle K. Mullins, Hillsdale Estates Homeowners Association, Willowbrook Development, Inc., Little Enterprises Limited Partnership, Garth Baldwin, and Phillip Fry filed protests. All protests except those of Davidson, Mullins, Baldwin, and Fry were dismissed or have been withdrawn.

6. On March 7, 2006, based on its filings with the Idaho Secretary of State, SunCor changed its name to Avimor, LLC. Based on this name change, SunCor has requested that the permit be issued in the name of Avimor, LLC. SunCor hereafter is referred to as Avimor in this order.

7. On April 27, 2006, the Department appointed L. Glen Saxton as the Hearing Officer ("Hearing Officer") pursuant to IDAPA Rules 37.01.01.410-413 and the relevant provisions of chapter 52, title 67, Idaho Code.

8. On October 31 and November 1, 2006, the Department held a hearing in Boise, Idaho. At the hearing, Albert P. Barker represented Avimor, and Judith M. Brawer represented Davidson, Baldwin and Mullins. Fry represented himself.

9. At the hearing, Avimor deleted two proposed points of diversion located in Section 23, T5N, R1W, B.M. from the Application, leaving a total of four points of diversion.

10. The four points of diversion, generally, are located within the Willow Creek drainage for which surface flow is tributary to the Boise River. However, ground water contours developed from limited data indicate that the direction of ground water flow at the location of the proposed wells is toward the Payette River drainage rather than the Boise River drainage. The Payette River drainage is not closed to new appropriations of either ground or surface water.

11. Avimor has access to the proposed place of use for the Project and to the proposed points of diversion.

12. Through their protests, Davidson, Baldwin, Fry, and Mullins expressed concern that sufficient studies of water availability have not been made, over-appropriation of ground water may occur, ground water contamination may occur, and that the amount of water to be appropriated is excessive. They also suggest a written mitigation plan and a long-term ground water monitoring plan are needed.

13. Davidson, Baldwin, Fry, and Mullins presented no technical data or other specific information for evaluating Avimor's Project that supported their concerns.

14. Fry suggested a change from the "first in time, first in right" principle to a concept of "equitable sharing" of water.

15. Mullins suggested a moratorium on development and a comprehensive water availability study and IDWR monitoring programs.

16. Davidson and Mullins do not own water rights or wells but instead receive their water from the City of Eagle and United Water Idaho, respectively.¹ Neither the City of Eagle nor United Water Idaho filed protests to the Application. Baldwin lives on Eagle Island, which is approximately 20 miles southwest of the Project, and receives his water from a municipal provider. Fry lives approximately 15 miles southwest of the Project and uses a domestic well for his water. Fry has filed a pending water right application to use ground water for irrigation in the Boise River drainage. None of the four own water rights that could be affected by the Application.

17. SunCor Development Company (“SunCor Development”) is the parent company for SunCor/Avimor. According to its 2005 Annual Report, SunCor Development has nearly \$500 million in assets. SunCor Development’s primary activities include acquisition, development, construction, operation, and sale of residential and commercial properties in the western United States. It is a wholly owned real estate development subsidiary of Pinnacle West Capital Corporation (“Pinnacle West”). According to Pinnacle West’s 2005 Annual Report, it has assets of \$11.3 billion and revenues of \$3 billion. Pinnacle West and SunCor Development are involved in numerous residential, commercial and industrial real estate and electrical energy projects in the western United States.

18. Avimor plans to own and operate water and sewer companies to serve the Project development.

19. In Idaho, municipal and irrigation uses are recognized as beneficial uses of water.

20. Annual ground water recharge tributary to the area of the proposed wells resulting from precipitation is estimated to be approximately 3,500 acre-feet per year (“AFY”), *see* Exh. 23 at ¶ 4, but the true amount is unknown because the area where water is proposed to be appropriated is “hydrologically unexplored.” *See* Exh. 27, p.22.

21. There is speculation about additional recharge to ground water in the Willow Creek Drainage from Farmer’s Union Canal, located on the edge of the northwest Ada County foothills, and from Black Canyon Canal, located on the southern edge of the rim bounding the east and south edge of the Emmett Valley. Although Avimor assumes those canal systems in the Boise and Payette River drainages may recharge ground water in the area of the proposed points of diversion, *see* Exh. 23 at ¶ 4, the canals do not overlie the area and are both located several miles from the Willow Creek Drainage where the wells are proposed.

22. According to the aquifer evaluation commissioned by Avimor for this Application, the western portion of the Spring Valley Ranch overlies a geologically complex, hydrologically unexplored area. *See* Exh. 27 at p.22. Although the ground water resources are characterized as “a significant water resource,” *see id.*, the aquifers underlying Spring Valley Ranch are not quantified.

23. The volumetric diversion sought from this Application could result in diversion of ground water of 3,620 AFY. When combined with the amounts previously

¹ IDWR understands that Davidson at the time of hearing had moved to Oregon but remained owner of the Eagle property.

approved in Permit No. 63-31966, the total volume that could be diverted under the Application and Permit No. 63-31966 would be 7,240 AFY.

24. Full build-out of the Project may require additional appropriations of water. Significant additional residential development is planned in the Northwest Ada County Foothills in the vicinity of the proposed points of diversion.

25. Unappropriated water exists for the use of ground water in the Willow Creek drainage. Avimor's estimates of water availability versus existing water use show there is water available for its use in excess of the amount of water presently used under the existing water rights in the Willow Creek drainage. Plus, water levels in existing wells in the drainage are stable.

26. The quantity of water available for appropriation in the Willow Creek drainage is not known.

27. Avimor proposes a number of water conservation measures including special landscaping, reuse of treated effluent from its sewage treatment plant and limiting the amount of irrigated turf in common areas.

28. On March 13, 2007, the Hearing Officer issued a Recommended Order approving the Application for permit subject to certain conditions.

29. On March 27, 2007, Davidson, Mullins and Baldwin ("Protestants") filed a Petition for Reconsideration of Recommended Order

30. On April 4, 2007, the Hearing Officer denied the petition for reconsideration finding the issues raised were previously considered and his Recommended Order did not need to be changed.

31. On April 17, 2007, Protestants filed their Exceptions to Order Denying Petition for Reconsideration of Recommended Order ("Protestants' Exceptions"), in essence taking exception to the approval of the Application.

32. On April 18, 2007, Avimor filed its Exceptions to Recommended Order, which included both exceptions and suggested clarifications, and on May 1, 2007, Avimor filed its Response to Protestants' Exceptions.

CONCLUSIONS OF LAW

1. This Final Order is issued pursuant to Idaho Code §§ 67-5244 and 67-5246.
2. Section 42-203A(5), Idaho Code, provides, in pertinent part:

In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved

therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

3. Avimor bears the ultimate burden of persuasion for satisfying the criteria of Idaho Code § 42-203A. IDAPA 37.03.08.40.04.c.

4. Use of water as proposed in the Application will not reduce the quantity of water under existing rights in the Willow Creek Drainage.

5. While the aquifer underlying Spring Valley Ranch is not quantified, Avimor offered evidence including transmissivity and well tests suggesting sufficient capacity. Avimor's estimates indicate excess water is available for appropriation in the Willow Creek Drainage. Thus, if used carefully according to the conditions presented in the Order, and mindful of the local public interest and conservation of water resources, the water supply itself is deemed sufficient for the purposes intended.

6. Given Avimor's development business, its ownership of the land at issue, its record of seeking various permits for the Project, and its progress physically developing the land, the Application is made in good faith and not for delay or speculative purposes.

7. Avimor must show that "it is reasonably probable that [it] can obtain the necessary financing to complete [its] project within the time constraints of the permit and the Idaho Code." *Shokal v. Dunn*, 109 Idaho 330, 335, 707 P.2d 441, 446 (1985). Based on Avimor's financial backing through its parent company, SunCor Development, and SunCor Development's considerable equity, Avimor has established that it has sufficient financial ability to complete the Project.

8. "Local public interest" is defined by Idaho Code § 42-202B(3) as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource."

9. The burden of proof as to where the public interest lies rests with Avimor, and as such, Avimor must "show that the project is either in the local public interest or that there are factors that outweigh the local public interest in favor of the project." *See Shokal*, 109 Idaho at 339, 707 P.2d at 450. *See also* IDAPA 37.03.08.40.04.b.

10. The determination of how the public interest is impacted and what the public interest requires is "committed to [IDWR's] sound discretion." *Collins Bros. Corp. v. Dunn*, 114 Idaho 600, 606, 759 P.2d 891, 897 (1988) (quoting *Shokal*, 109 Idaho at 339, 707 P.2d at 450).

11. It would not be in the local public interest to allow a single large development entity to hold water rights to a significant portion of a limited public resource for irrigation of common areas when the water may be needed to supply the domestic,

culinary and potable water needs for future development. Accordingly, to the extent feasible, irrigation of common areas, including parks, golf courses, school grounds, and other similar irrigation uses should not be allowed under the proposed appropriation unless that land is irrigated with water already used for culinary/potable use that is recaptured and treated.

12. The Application is not contrary to the conservation of water resources within the state of Idaho if the water is used primarily for domestic, culinary and potable purposes under the municipal water right. The conditions provided in this order seek to ensure Avimor's compliance with this limitation.

13. Although the points of diversion and place of use are at different locations, Avimor intends to use the ground water in the same general locale where it is withdrawn, thus keeping the benefits of the use within the same area or watershed.

14. Under Idaho law, a municipal provider includes "[a]ny corporation or association holding a franchise to supply water for municipal purposes, or a political subdivision of the state of Idaho authorized to supply water for municipal purposes, and which does supply water, for municipal purposes to users within its service area" and "[a] corporation or association which supplies water for municipal purposes through a water system regulated by the state of Idaho as a 'public water supply' as described in section 39-103(12), Idaho Code." I. C. § 42-202B(5).

15. Municipal purposes "refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, ... which a municipal provider is entitled or obligated to supply to all those users within a service area, including those located outside the boundaries of a municipality served by a municipal provider." I. C. § 42-202B(6).

16. Planning horizon is defined by Idaho Code § 42-202B(7) as "the length of time that the department determines is reasonable for a municipal provider to hold water rights to meet reasonably anticipated future needs."

17. Reasonably anticipated future needs is defined by Idaho Code § 42-202B(8) as:

future uses of water by a municipal provider for municipal purposes within a service area which, on the basis of population and other planning data, are reasonably expected to be required within the planning horizon of each municipality within the service area not inconsistent with comprehensive land use plans approved by each municipality. Reasonably anticipated future needs shall not include uses of water within areas overlapped by conflicting comprehensive land use plans.

18. Protestants suggest that if Avimor qualifies as a municipal provider then it necessarily needs to seek to hold water for its reasonably anticipated future needs and establish a planning horizon consistent with Idaho law. However, none of the statutory references cited by Protestants require that municipal providers hold water for reasonably anticipated future needs. Indeed, Avimor repeatedly made clear in this application process that it was foregoing the opportunity to seek to "reserve" water for such future use.

19. To the extent Protestants' Exceptions may be construed to request further reconsideration of the Hearing Officer's denial of their motion to disqualify him, the request is denied.

20. The Department has the authority to grant a permit upon conditions. Idaho Code § 42-203A; *Collins Bros. Corp.*, 114 Idaho at 606; IDAPA 37.03.08.050.01.

ORDER

IT IS THEREFORE HEREBY ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, Application for Permit No. 63-32061 filed by SunCor, LLC is approved and shall be issued in the name of Avimor, LLC subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before August 1, 2013.
2. Use of water under the permit shall be subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of IDWR that delays were due to circumstances over which the permit holder had no control.
4. The permit holder shall comply with the drilling permit requirements of Idaho Code § 42-235 and the Department's applicable Well Construction Rules.
5. Ground water discharged to a subsurface system must be authorized by a separate injection well permit. At the time of permit approval, reinjection of water diverted under this permit into the ground water is authorized at the following well locations and by the associated injection well permits:
NWSESE, Section 1, T5N, R1E (injection well permit no. 63W208001);
NWSESE, Section 1, T5N, R1E (injection well permit no. 63W208002); and
NWSWSE, Section 6, T5N, R2E (injection well permit no. 63W208003).
6. The water bearing zone to be appropriated is from 200 feet to 1,000 feet.
7. The place of use is within the area served by the public water supply system of Avimor, LLC for use within the Spring Valley Ranch. The place of use is generally located within Sections 1, 12, 13, and 24, T5N, R1E; Sections 5-7, 17, 18, and 20, T5N, R2E; Section 36, T6N, R1E, B.M., and Sections 31 and 32, T6N, R2E.
8. A map depicting the place of use boundary for this water right at the time of this approval shall be attached to the permit for illustration purposes.
9. Use of water under this water right may be affected by a private agreement between Avimor (or its predecessor SunCor) and the North Ada County Foothills Association in connection with an agreed upon water level monitoring program.

10. Water diverted under this right shall not be provided for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.
11. The right holder shall fully utilize treated waste water for irrigation purposes on all common areas, including parks, playgrounds, golf courses and other similar areas, prior to applying any water under this right to such common area parcels. This condition shall not apply to small isolated common area parcels for which connection to the waste water reuse system is not feasible. The right holder shall provide the Department with a schematic of the waste water reuse system identifying any small isolated common area parcels for which the right holder requests this condition not apply.
12. Water diverted under this right may be used for direct irrigation of up to one-half (½) acre per residential lot upon which a home has been constructed.
13. Water used for recharge under this right and rediverted under right 63-31966 for irrigation use on common areas is subject to the condition that where feasible treated waste water shall be used first on these common areas as required by Condition 11.
14. Prior to diversion of water under this right, the permit holder shall prepare and submit an ongoing monitoring and data submittal plan, acceptable to IDWR, to demonstrate that the ground water diverted from authorized points of diversion is tributary to the Payette River drainage.
15. Prior to diversion of water under this right, the permit holder shall provide a means of measurement, acceptable to IDWR, from all authorized points of diversion which will allow determination of the total rate of diversion and volume of water diverted.
16. Prior to or at the time of submitting a proof of beneficial use statement for municipal water use under this right, the permit holder shall provide IDWR with documentation showing the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply system and that the permit holder has been issued a public water supply system number.
17. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

IT IS FURTHER ORDERED that any party may file a petition for reconsideration of this final order within fourteen (14) days of the service date of this order. The agency will dispose of the petition for reconsideration within twenty-one (21) days of its receipt,

or the petition will be considered denied by operation of law pursuant to Idaho Code § 67-5246.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by this final order may appeal to district court by filing a petition in the district court of the county in which a hearing was held, the final agency action was taken, the party seeking review of the order resides, or the real property or personal property that was the subject of the agency action is located. The appeal must be filed within twenty-eight (28) days: (a) of the service date of the final order; (b) of an order denying petition for reconsideration; or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration, whichever is later. *See* Idaho Code § 67-5273. The filing of an appeal to district court does not in itself stay the effectiveness or enforcement of the order under appeal.

DATED this 7th day of August 2008.


DAVID R. TUTHILL, JR.
Director

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of August 2008, a true and correct copy of the following document(s) described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) served: Final Order

Person(s) served:

Albert P. Barker, Esq.
Barker Rosholt & Simpson
P.O. Box 2139
Boise, ID 83701-2139

Phillip Fry
4211 Homer Road
Eagle, ID 83616

Judith M. Brawer, Esq.
Attorney at Law
1502 N. 7th Street
Boise, ID 83702



Victoria Wigle
Administrative Assistant to the Director
Idaho Department of Water Resources

BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63- 32061 IN THE)
NAME OF SUNCOR IDAHO, LLC)
_____)

**ORDER DENYING PETITION
FOR RECONSIDERATION**

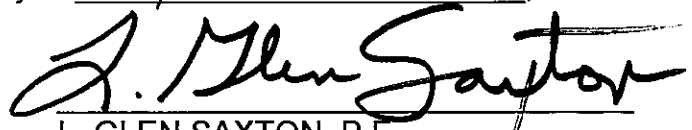
On March 13, 2007, the hearing officer for the Department of Water Resources ("hearing officer") issued a Recommended Order approving the above captioned application for permit filed in the name of SunCor Idaho, LLC ("applicant").

On March 27, 2007, protestants Rod Davidson, Lyle Mullins and Garth Baldwin ("protestants") filed a Petition for Reconsideration of Recommended Order ("petition") with the hearing officer.

ORDER

The hearing officer has reviewed the petition and HEREBY ORDERS that the petition is **DENIED**, since the protestants did not raise any issues that need to be changed or that the hearing officer has not previously considered.

Dated this 14th day of April, 2007.



L. GLEN SAXTON, P.E.
Hearing Officer

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of April, 2007, a true and correct copy of the document(s) described below was served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document(s) Served: Order Denying Petition for Reconsideration

SUNCOR IDAHO LLC
C/O ALBERT P BARKER
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139

PHILLIP FRY
4122 HOMER RD
EAGLE ID 83616

ROD DAVIDSON
GARTH BALDWIN
LYLE MULLINS
C/O JUDITH BRAWER
1502 N 7TH ST
BOISE ID 83702

IDWR – WESTERN REGION
2735 AIRPORT WAY
BOISE ID 83705-5082

Deborah J. Gibson

Deborah J. Gibson
Administrative Assistant
Idaho Department of Water Resources

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 63-32061 IN THE)	
NAME OF SUNCOR IDAHO, LLC)	RECOMMENDED ORDER
_____)	

This matter came before the Idaho Department of Water Resources ("Department" or "IDWR") in the form of a protested application for permit. The Department held conferences and scheduled a hearing in the matter to be held on October 31 and November 1, 2006 as described below in this Recommended Order.

On October 23, 2006, protestants Rod Davidson, Lyle Mullins and Garth Baldwin filed Protestants' Motion to Disqualify Hearing Officer for Cause stating that the hearing officer in the matter "may" have bias associated with prior involvement in SunCor's water rights and opinions associated with prior IDWR directives as a former employee of the IDWR. On October 24, 2006, the applicant responded with Applicant's Opposition to Protestants' Motion to Disqualify Hearing Officer For Cause and on October 25, 2006, the protestants filed Protestant's Response to Applicant's Opposition to Motion to Disqualify Hearing Officer For Cause. After reviewing the motions and responses, at the hearing held on October 31, 2006, the hearing officer denied the protestant's motion to disqualify the hearing officer. Reasons for denial include the late filing of the motion (8 days before the hearing that had been scheduled for approximately 2 and ½ months), an insufficient showing that the hearing officer was biased due to prior involvement in policies of IDWR and a lack of any showing that signing a prior permit of the applicant on behalf of the Director of IDWR constitutes bias of the hearing officer.

On November 13, 2006, the applicant filed Avimor LLC's Motion to Augment Record requesting that the hearing officer augment the record or take official notice of a Memorandum Decision in the case of City of Boise v. Ada County, CV-OC-06-0498, dismissing the City of Boise's petition for judicial review of Ada County's approval of Avimor's planned community. Since the protestants did not object or oppose the request of the applicant, the hearing officer takes official notice of the memorandum decision.

Based on his understanding of the facts in this matter, the hearing officer enters the following Findings of Fact, Conclusions of Law and Recommended Order:

FINDINGS OF FACT

1. On January 25, 2005, SunCor Idaho, LLC ("applicant") submitted Application for Permit No. 63-32061 ("application") to the Department proposing the diversion of 5.0

cubic feet per second ("cfs") of ground water to be used year-round for municipal purposes. The location of the proposed points of diversion are within SW1/4SW1/4 Section 8, SW1/4NW1/4 Section 9, SE1/4NW1/4 Section 18, T5N, R1E, B.M.; and SE1/4NW1/4 Section 13, SW1/4NE1/4, NE1/4SW1/4 Section 23, T5N, R1W, B.M. The proposed place of use is located within parts of Sections 1, 12, 13 and 24, T5N, R1E, B.M.; Sections 5, 6, 7, 17, 18 and 20, T5N, R2E, B.M.; Section 36, T6N, R1E, B.M. and Sections 31 and 32, T6N, R2E, B.M. (See Applicant's Exhibit 39). The place of use is also referred to by the applicant as the "Core Area" of the planned development and includes parts of Boise, Gem and Ada Counties. The application does not seek to obtain and hold a water right for reasonably anticipated future needs ("RAFN") for a planning horizon ("PH") associated with diversion and use of water under the application.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).

2. The Department published notice of the application that was subsequently protested by North Ada County Foothills Association by David J. Head, Rod Davidson, Lyle K. Mullins, Hillsdale Homeowners Association, Inc. by Roy B. Johnson, Willowbrook Development, Inc. by Richard M. Phillips, Little Enterprises Limited Partnership by Brad Little, Baldwin Realty, Inc. by Garth Baldwin, and Philip Fry. All protests except those of Rod Davidson, Garth Baldwin, Philip Fry and Lyle K. Mullins have been withdrawn or dismissed.

3. On October 31, 2006, the Department conducted a hearing in the matter in Boise, Idaho. The applicant was represented by Albert P. Barker. Protestants Rod Davidson, Lyle Mullins and Garth Baldwin were represented by Judith M. Brawer. Philip Fry represented himself.

4. Issues the Department can consider in this matter are as follows:
- a. Whether the appropriation will reduce the quantity of water under existing water rights;
 - b. Whether the water supply itself is insufficient for the purpose for which it is sought to be appropriated;
 - c. Whether the application is made in good faith, or is made for delay or speculative purposes;
 - d. Whether the applicant has sufficient financial resources with which to complete the work involved therein;
 - e. Whether the proposed appropriation will conflict with the local public interest; and
 - f. Whether the proposed appropriation is contrary to conservation of water resources within the state of Idaho.
 - g. Whether the proposed use will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates.

5. Exhibits premarked, offered or accepted as a part of the record are as follows:

Applicant's Exhibits:

1. Certificate of Secretary, Company Structure Chart, Articles of Amendment
2. SunCor Development Company 2005 Annual Report
3. 2005 Pinnacle West Capital Corporation Annual Report
4. Special Warranty Deed (Spring Valley – Ada), Special Warranty Deed (Spring Valley – Boise) and Special Warranty Deed (Spring Valley – Gem)
5. Memorandum of Agreements – (Ada County), Memorandum of Agreements (Boise County) and Memorandum of Agreements (Gem County)
6. Memorandum of Declaration of covenants, restrictions and easements dated January 23, 2006
7. Development Agreement Between the County of Ada, Idaho, and SunCor Idaho, LLC, an Idaho Limited Liability Company
8. Letter dated June 27, 2006 to Michael D. Wardle from Ervin Ballou
9. Letter dated June 27, 2006 to Robert G. Taunton from the Department of the Army Corps of Engineers
10. Letter dated August 14, 2006 to Kevin Wentland from Gregory J. Martinez
11. Letter dated August 22, 2006 to Kevin Wentland from Michael Stambulis
12. Letter dated September 6, 2006 to Kevin A. Wentland from Peter S. Bair
13. Letter dated September 18, 2006 to Chas Ariss from Kevin A. Wentland
14. Letter dated September 26, 2006 to Kevin Sablan from Kevin A. Wentland
15. Letter dated October 3, 2006 to Darrin Carroll from Brian Wilkinson
16. Letter dated August 25, 2006 to Michael Lidgard from Kevin A. Wentland
17. Engineered Grading Permit #06-16 dated June 21, 2006 issued by Ada County Development Services together with an aerial photo
18. Letter dated February 9, 2006 to SunCor Idaho LLC from Mark A. Pecchenino and letter dated August 21, 2006 to Michael Wardle from Mark Pecchenino
19. Comprehensive Plan Amendment Application to the City of Eagle received on September 22, 2006
20. Articles of Incorporation for Highland Water Company and for Foothills Sewer Company
21. Land Use Summary (3 pages)
22. Application for Permit (63-32061) in the name of SunCor Idaho, LLC
23. Letter dated March 3, 2005 to Steve Lester from Terry M. Scanlan
24. Idaho Department of Water Resources Water Right Application Report 63-32061
25. Letter dated September 7, 2005 to North Ada County Foothills Association from Terry M. Scanlan
26. Report dated April 2003 titled Groundwater Exploration Drilling in the Spring Valley Ranch Vicinity of Gem, Ada, and Boise Counties, Idaho prepared for SunCor Development Company by Scanlan Engineering

27. Report dated October 2004 titled Aquifer Evaluation in the Big Gulch and Little Gulch Areas of Spring Valley Ranch prepared for SunCor Development Company by SPF Water Engineering, LLC
28. Report dated June 17, 2004 titled Well Construction and Aquifer Testing of Spring Valley Ranch Exploration Well No. 5 prepared for SunCor Development Company by SPF Water Engineering, LLC
29. Report dated June 18, 2004 titled Well Construction and Aquifer Testing in the Sandy Hill Area of Spring Valley prepared for SunCor Development Company by SPF Water Engineering, LLC
30. Water Rights Map for the Avimor and Spring Valley Ranch Resource Area dated October 19, 2006
31. Well Density Map for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
32. Geologic Map for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
33. Aquifer Boundaries Map for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
34. Hydrologic Sub-Basin Map for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
35. Public Water Systems Map for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
36. Ground Water Contour Map for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
37. Design Flows – Public Water Systems dated July 2, 1999 by Monty G. Marchus, IDEQ
38. Lynn Water Level Measurements
39. Avimor Proposed Place of Use and Points of Diversion dated October 19, 2006
40. Willow Creek Area Water Rights dated October 19, 2006
41. Avimor Proposed Place of Use and Points of Diversion and Protestants' Points of Diversion dated October 19, 2006
42. Memo dated October 16, 2006 with attachments to Bob Taunton from Terry Scanlan related to the status of the SunCor Water-Level Monitoring Program for the Avimor and Spring Valley Ranch Resource Area dated January 20, 2006
43. Letter dated March 1, 2006 to Bob Taunton from John Sharkey with attached injection Well Permits 63W208001, 63W208002 and 63W208003
44. Resume for Terry M. Scanlan
45. Resume for Christian R. Petrich
46. Testimony of Philip Fry, Ada County Planning & Zoning Commission RE: Avimor Planned Community, October 6, 2005
47. Testimony of Lyle Mullins, Ada County Planning & Zoning Commission RE: Avimor Planned Community, November 10, 2005
48. Testimony of Rod Davidson and Lyle Mullins, Ada County Board of Commissioners Meeting RE: Avimor Planned Community, December 14, 2005

49. IDWR Water Right and Adjudication Search – Rod Davidson
50. IDWR Water Right and Adjudication Search – Lyle Mullins
51. Idaho Department of Water Resources Water Application Report – Lida R and Philip N. Fry – Water Right No. 63-31147
52. Idaho Department of Water Resources Water Permit Report – Horseshu Vue Ranch Water & Road Assn Inc.
53. Idaho Department of Water Resources Water Right Report – Garth Baldwin – Water Right 63-7565
54. Preliminary Feasibility Assessment – Spring Valley Ranch – July 2001
55. Protestant Lyle Mullins issues and questions – SunCor/IDWR Prehearing Conference 09-08-05
56. Protestant Lyle Mullins issues and questions – SunCor/IDWR Prehearing Conference 07-26-06
57. Phillip Fry Protest to Application 63-32061 dated May 23, 2005
58. Letter dated March 3, 2005 to Steve Lester from Terry M. Scanlan together with 2 figures
59. Section B.13 – Specific Plan – Avimor Planned Community
60. Comprehensive Plan Amendment Map – Avimor
61. Net Density Summary – Avimor
62. Aerial View of Avimor Planned Community
63. Declaration of Restrictions and Easements
64. Letter dated November 1, 2006 to Bob Taunton from John K. Graham

Protestant's Exhibits:

- A. Permit to Appropriate Water No. 63-31966
- B. Application for Permit No. 63-31966
- C. Comment Report 63-31966
- D. Memorandum dated February 15, 2005 from Steve Lester to File
- E. SunCor Applications 63-31966 & 63-32061
- F. Memo dated February 14, 2005 from Jeff Peppersack to Steve Lester
- G. Memorandum dated August 15, 2003 from Shelley W. Keen to Jeff Peppersack and Glen Saxton
- H. Letter dated December 27, 2004 To State of Idaho, Western Region Office from Gemma Family Trust (Jim and Janice Barsby)
- I. Letter dated November 29, 2004 from Garth Baldwin
- J. Letter dated October 1, 2004 to Steve Lester from Terry M. Scanlan together with attachments
- K. Idaho Secretary of State, Viewing Business Entity – Highland Water Company
- L. Letter dated September 27, 2004 to Steve Lester from Michael D. Wardle
- M. Letter dated August 6, 2004 to Terry Scanlan from Steve Lester
- N. Email dated August 6, 2004 to Glen Saxton and Gary Spackman from Steve Lester
- O. Memorandum dated June 16, 2004 to John Westra and Rob Whitney from Steve Lester
- P. Letter dated January 23, 2003 to Tom Sellin from Terry M. Scanlan

- Q. Memorandum dated May 7, 1979 to Dave Tuthill from Phil Rassier
- R. Administrator's Memorandum dated November 5, 1979 to Regional Offices and Water Allocation Section from Norman Young
- S. Memorandum to Water Allocation Bureau, Adjudication Bureau and Regional offices from L. Glen Saxton
- T. Letter dated May 2, 2006 to David Head from Karl J. Dreher
- U. Presentation on the SunCor Well Protest (63-32061) by Philip Fry

6. On March 11, 2005, the Department issued Permit No. 63-31966 in the name of SunCor Idaho, LLC, authorizing the diversion of 5.0 cfs of ground water for municipal purposes to be diverted year-round from wells located in Spring Valley in Lot 6 (NWSW) and Lot 7 (SWSW) Section 6, NWSE and SESE Section 7, and SWNE Section 18, all in T5N, R2E, B.M. and two points within the SESE Section 1, T5N, R1E, B.M. in Ada County. The place of use is within Spring Valley Ranch generally located within Sections 1, 12, 13 and 24, T5N, R1E, B.M.; Sections 5, 6, 7, 17, 18 and 20, T5N, R2E, B.M.; Section 36, T6N, R1E, B.M.; and Sections 31 and 32, T6N, R2E, B.M. The permit authorizes a development period of 5 years with the proof of beneficial use of water being due on or before March 1, 2010. The permit does not authorize a RAFN or a PH associated with diversion and use of water under the permit.

7. SunCor Development Company is the parent company of SunCor Idaho, LLC that subsequently has been renamed Avimor, LLC. (See Applicant's Exhibit 1). SunCor Development Company has over \$200 million in equity and is one of several companies that make up the Pinnacle West Capital Corporation ("Pinnacle West"). Pinnacle West is a Phoenix-based company with consolidated assets of \$11.3 billion and consolidated revenues of \$3 billion. Pinnacle West and SunCor Development Company are involved in numerous residential, commercial and industrial real estate and electrical energy projects in the western United States. (See Applicant's Exhibits 2 and 3).

8. The Avimor planned community ("Avimor" or "project") is located northwest of Boise, Idaho in northern Ada County in Spring Valley. The proposed points of diversion in the application are located approximately 4 to 8 miles west of the place of use. A pipeline will be constructed to convey water to Avimor. Water will be used directly in the proposed public water system.

9. Application for Permit No. 63-32061 proposes diversion of ground water for reinjection into the subsurface for recharge of ground water through injection wells located several miles east and north of the points of diversion proposed by this application. IDWR approved three injection wells located and identified as follows (See Applicant's Exhibit 43):

<u>PLS Description of Injection Well</u>	<u>Injection Well Permit No.</u>
NWSESE, Section 1, T5N, R1E, B.M.	63W208001
NWSESE, Section 1, T5N, R1E, B.M.	63W208002
NWSWSE, Section 6, T5N, R2E, B.M.	63W208003

The two wells located in the NWSESE of Section 1, T5N, R1E, B.M. may be points of diversion described by Permit No. 63-31966.

10. The applicant has access to the proposed place of use for the planned development and to the proposed points of diversion (See Applicant's Exhibits 4 through 7 and Exhibits 63 and 64).

11. Application for Permit No. 63-32061 seeks recognition of "aquifer storage and recovery" as a sub-use of "municipal." No evidence was submitted to show how much water could be placed in ground water storage, how long it would be stored, and how much of the water injected into the subsurface would be available for recovery.

12. The initial phase of the project is located along State Highway 55 in Spring Valley and will consist of 684 dwelling units on about 840 acres of land. Ultimate build out of the Core Area will consist of about 3,500 dwelling units on about 4,500 acres of land. (See Figure 1 of Applicant's Exhibit 28).

13. At the hearing, the applicant deleted two proposed points of diversion located in Section 23, T5N, R1W, B.M. from its application leaving a total of four points of diversion. (See Applicant's Exhibit 39).

14. The applicant has access to the proposed place of use for the planned development and to the proposed points of diversion (See Applicant's Exhibits 4 through 7 and Exhibits 63 and 64).

15. The applicant has obtained or has applied for other permit approvals associated with its planned Avimor development and has started grading at the Avimor site. (See Exhibits 8 through 17).

16. The applicant plans to own and operate water and sewer companies to serve the Avimor development. (See Applicant's Exhibits 21).

17. The general location of the four points of diversion is within the Willow Creek drainage. Surface water in the Willow Creek drainage is tributary to the Boise River. Ground water contours developed from limited data indicate that the direction of ground water flow at the location of the proposed wells is toward the Payette River, and that the ground water is tributary to the Payette River drainage (Basin 65) rather than the Boise River drainage (Basin 63). (See Applicant's Exhibit 36 and Exhibit 27, Sheet 1). The Payette River drainage is not closed to new appropriations of either ground water or surface water.

18. Total diversion under this water right could result in diversion from the ground water of 3,620 acre-feet per year (See Applicant's Exhibit 23). Added to the previously approved Permit No. 63-31966 authorizing the appropriation of 5.0 cfs, the total volume that could be diverted under this proposed appropriation and Permit No. 63-31966 would be 7,240 acre-feet.

19. Annual ground water recharge resulting from precipitation is estimated to be approximately 3,500 acre-feet (See Applicant's Exhibit 23). There is speculation about additional recharge to ground water in the Willow Creek Drainage from Farmer's Union Canal, located on the edge of the northwest Ada County foothills, and from Black Canyon Canal, located on the southern edge of the rim bounding the east and south edge of the Emmett Valley (See Applicant's Exhibit 23).

20. "The Western portion of the Spring Valley Ranch overlies a geologically complex, hydrologically unexplored area." Although the ground water resources are characterized as "a significant water resource," the aquifers underlying Spring Valley Ranch are not quantified.

21. Despite assumptions that canal systems in the Boise and Payette River Valleys may recharge ground water in the area of the proposed points of diversion, the canals do not overlie the recharge area and are both located several miles from the Willow Creek Drainage where the wells are proposed.

22. Full build out of the development proposed by SunCor may require additional appropriations of water. Furthermore, significant additional residential development is proposed in the Northwest Ada County Foothills in the vicinity of the proposed points of diversion.

23. There are existing rights for the use of ground water in the Willow Creek drainage. The applicant's estimates of water availability versus existing water use show there is water available for the applicant's use in excess of the amount of water presently used under the existing water rights in the Willow Creek drainage. (See Applicant's Exhibit 58). Water levels in the existing wells in the drainage are stable. (See Applicant's Exhibit 38).

24. The quantity of water available for appropriation in the Willow Creek drainage is not known.

25. The applicant proposes a number of water conservation measures including special landscaping, reuse of treated effluent from its sewage treatment plant, and limiting the amount of irrigated turf in common areas. (See Applicant's Exhibit 59).

26. Uses of water for municipal purposes and for irrigation are typical beneficial uses of water in Idaho.

27. The protestants generally are concerned that sufficient studies of water availability have not been made, a written mitigation plan is needed, a long term ground water monitoring plan is needed, potential over appropriation of ground water will occur, potential ground water contamination may occur, and that the amount of water to be appropriated is excessive. The protestants, however, have provided no technical data or other specific information for evaluation of the applicant's project with respect to their expressed concerns. Protestant Fry suggests a change in the "first in time, first in right"

principal to a concept of "equitable sharing" of water. Protestant Mullins seeks a moratorium on development and wants a comprehensive water availability study and monitoring program by IDWR.

28. Protestants Rod Davidson and Lyle Mullins do not own water rights or wells and receive water from the city of Eagle and United Water Idaho, respectively. (See Applicant's Exhibit 49 and 50). Neither the city of Eagle nor United Water Idaho has protested the captioned application. Protestant Baldwin lives on Eagle Island located about 20 miles southwest of the applicant's project and also receives water from a municipal provider. Protestant Fry lives approximately 15 miles southwest of the applicant's project and obtains water from a domestic well in Basin 63. He has filed a pending water right application to use ground water for irrigation in Basin 63.

CONCLUSIONS OF LAW

1. Section 42-203A, Idaho Code, provides in pertinent part as follows:

In all applications whether protested or not protested where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest as defined in section 42-202B, Idaho Code, or (f) that it is contrary to conservation of water resources within the state of Idaho, or (g) that it will adversely affect the local economy of the watershed or local area within which the source of water for the proposed use originates, in the case where the place of use is outside of the watershed or local area where the source of water originates; the director of the department of water resources may reject such application and refuse issuance of a permit therefor, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. ...

2. The local public interest is defined in Idaho Code, Section 42-202B as "the interests that the people in the area directly affected by a proposed water use have in the effects of such use on the public water resource."

3. The protestants do not own any water rights that could be affected by the applicant's proposal.

4. Use of water as proposed in the application will not reduce the quantity of water under existing water rights.

5. The water supply itself is sufficient for the purposes intended if it is carefully used as described in the subsequent discussion in these conclusions about local public interest and conservation of water resources.

6. The application is made in good faith and not for delay or speculative purposes.

7. The applicant has sufficient financial resources with which to complete the project.

8. Significant additional residential development is proposed in the vicinity of the development proposed by SunCor. Presently, the amount of recharge is unknown because the area where water is proposed to be appropriated is "hydrologically unexplored." Potential sources of significant recharge are remote from the area where ground water is sought to be appropriated.

9. It would not be in the local public interest to allow a single large development entity to hold water rights to a significant portion of a limited public resource that may be needed to supply the culinary and potable water needs to future anticipated development. As a result, irrigation of common areas, large parks, golf courses, school grounds and other large irrigation uses should not be allowed under the proposed appropriation unless the land is irrigated with water already used for culinary/potable use that is recaptured and treated.

10. With the above limitations, the application does not conflict with the local public interest.

11. The application is not contrary to the conservation of water resources within Idaho if water is carefully used for culinary and potable use.

12. Idaho Code, Section 42-202B(6) defines "Municipal purposes" as "water for residential, commercial, industrial, irrigation of parks and open space, and related purposes, excluding use of water from geothermal sources for heating, which a municipal provider is entitled or obligated to supply . . ." The definition does not expressly recognize aquifer storage and recovery as a use of water, and also does not expressly recognize ground water recharge as a use of water.

13. Aquifer storage and recovery is not assumed to be a sub-use within the definition of "municipal purposes." Aquifer storage and recovery can be expressly recognized, however, if sufficient evidence is presented to insure that a municipal provider's diversion is limited to the amount of water placed and retained in aquifer storage. Evidence of placement and retention was not presented at the hearing.

14. Ground water recharge is not assumed to be a sub-use within the definition of "municipal purposes." Ground water recharge can be expressly recognized as a municipal sub-use, however.

15. If this application approves recharge without restrictions, the water diverted for recharge could be used for irrigation of large parcels under previously approved Permit No. 63-31966 when it cannot be used for large parcel irrigation under this permit. As a result, water delivered for recharge should not exceed the base wintertime water flows and volumes diverted from the points of diversion authorized by Permit No. 63-31966 during the non-irrigation season.

16. Although the points of diversion and place of use are located in different administrative water basins (63 and 65), the diversion and place of use are within the same general area where the ground water originates and do not adversely impact the local economy of the area.

17. The Department should approve the application with certain conditions.

ANALYSIS

The protestants state that municipal provider status of the applicant and whether SunCor's application as a municipal provider is complete are central to their protest in the matter. The protestants incorrectly associate municipal provider status with reasonably anticipated future needs and a planning horizon for a municipal provider.

An applicant can apply for a municipal use of water if it qualifies as a municipal provider as provided in Section 42-202B, Idaho Code. A municipal provider is not required to make a RAFN or PH a part of an application to appropriate water. In this case, the applicant clearly has chosen not to include RAFN or PH as a part of its application, thus foregoing the opportunity to "reserve" a block of water for future use. It seems that exclusion of this opportunity by the applicant should meet more with the protestant's approval than opposition. With respect to the timing of meeting qualifications to qualify as a municipal provider, IDWR has the discretion to make this determination and may grant a permit with conditions to meet municipal provider status.

Protestant Fry's concept of "equitable sharing" of water resources in the state has a certain appeal when thinking about general fairness of the use of the state's natural resources. In Idaho, however, the law does not provide for "equitable sharing" of water. IDWR has the authority, however, in considering the local public interest and conservation of water of the state of Idaho, to limit the use of water if the supply of water is finite, and there are significant anticipated uses of the finite resources in the near future.

The protestants also state that they want comprehensive studies made by IDWR before approving the pending application or other applications that may be submitted for similar developments in the future. Extensive knowledge of an aquifer and its characteristics and limitations, if any, is certainly desirable, would make IDWR's allocation of the state's resources much easier and would eliminate many potential conflicts. In order to engage in such studies for basins in Idaho, however, resources that are not presently available in terms of funding and personnel would need to be made available to IDWR.

ORDER

IT IS THEREFORE hereby ORDERED that Application for Permit No. 63-32061 in the name of SunCor, Idaho, LLC is **APPROVED** subject to the following conditions:

1. Proof of application of water to beneficial use shall be submitted on or before **May 1, 2012**.
2. Subject to all prior water rights.
3. Project construction shall commence within one year from the date of permit issuance and shall proceed diligently to completion unless it can be shown to the satisfaction of the Director of the Department of Water Resources that delays were due to circumstances over which the permit holder had no control.
4. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code and applicable Well Construction Rules of the Department.
5. Ground water discharged to a subsurface system must be authorized by a separate injection well permit. At the time of permit approval, reinjection of water diverted under this permit into the ground water is authorized at the following well locations and by the associated injection well permits : NWSESE, Section 1, T5N, R1E (Injection well permit no. 63W208001); NWSESE, Section 1, T5N, R1E (Injection well permit no. 63W208002); and NWSWSE, Section 6, T5N, R2E (Injection well permit no. 63W208003).
6. Water bearing zone to be appropriated is from 200 feet to 1,000 feet.
7. Place of use is within the area served by the public water supply system of SunCor Idaho, LLC for use within the Spring Valley Ranch. The place of use is generally located within Sections 1, 12, 13 and 24, T5N, R1E; Sections 5, 6, 7, 17, 18 and 20, T5N, R2E; Section 36, T6N, R1E, B.M, and Sections 31 and 32, T6N, R2E.
8. A map depicting the place of use boundary for this water right at the time of this approval is attached to this document for illustration purposes.
9. Use of water under this permit may be affected by a private agreement between the applicant and the North Ada County Foothills Association in connection with an agreed upon water level monitoring program.
10. The right holder shall not provide water diverted under this right for the irrigation of land having appurtenant surface water rights as a primary source of irrigation water except when the surface water rights are not available for use. This condition applies to all land with appurtenant surface water rights, including land converted from irrigated agricultural use to other land uses but still requiring water to irrigate lawns and landscaping.

11. Common areas, parks, school grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.

12. Water diverted under this right may be used for direct irrigation of up to 1/2 acre per residential lot upon which a home has been constructed.

13. Water delivered for recharge under this right cannot exceed the base wintertime water flows and volumes diverted from the points of diversion authorized by permit no. 63-31966 during the non irrigation season.

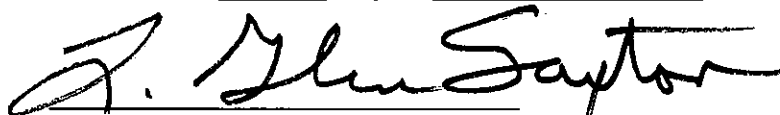
14. Prior to diversion of water under this right, the permit holder shall prepare and submit an ongoing monitoring and data submittal plan, acceptable to IDWR, to demonstrate that the ground water diverted from the authorized points of diversion is tributary to the Payette River drainage.

15. Prior to diversion of water under this right, the right holder shall provide a means of measurement acceptable to the Department from all authorized points of diversion which will allow determination of the total rate of diversion and volume of water diverted.

16. Prior to or in connection with the proof of beneficial use statement to be submitted for municipal water use under this right, the right holder shall provide the Department with documentation showing that the water supply system is being regulated by the Idaho Department of Environmental Quality as a public water supply and that it has been issued a public water supply number.

17. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.

Signed this 13th day of March, 2007.


L. GLEN SAXTON, P.E.
Hearing Officer

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 13th day of March, 2007, a true and correct copy of the documents described below were served by placing a copy of the same in the United States mail, postage prepaid and properly addressed to the following:

Document Served: Recommended Order and Explanatory Information to
Accompany a Recommended Order

SUNCOR IDAHO LLC
C/O ALBERT P BARKER
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139

PHILLIP FRY
4122 HOMER RD
EAGLE ID 83616

ROD DAVIDSON
GARTH BALDWIN
LYLE MULLINS
C/O JUDITH BRAWER
1502 N 7TH ST
BOISE ID 83702


Deborah J. Gibson
Administrative Assistant
Idaho Department of Water Resources

**STARTING
RIGHT
SIDE OF
FILE**

Albert P. Barker, ISB #2867
Paul L. Arrington, ISB #7198
BARKER ROSHOLT & SIMPSON LLP
1010 W. Jefferson, Suite 102
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Telephone: (208) 336-0700
Facsimile: (208) 344-6034

RECEIVED

MAY 01 2007

DEPARTMENT OF
WATER RESOURCES

Attorneys for Suncor Idaho LLC (n.k.a. Avimor, LLC)

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-32061 IN THE) **AVIMOR LLC'S RESPONSE TO**
NAME OF SUNCOR IDAHO, LLC) **PROTESTANTS' EXCEPTIONS**
)
)
)

_____) **COMES NOW**, Avimor LLC, formerly known as SunCor Idaho LLC, and submits this
Response to Protestants' Exceptions, pursuant to Department Rule of Procedure 720.02.C.

INTRODUCTION

Protestants' Exceptions are identical to their Petition for Rehearing, except relabeled as "Exceptions." The Hearing Officer denied that petition. Protestants offer nothing new. Protestants have failed to provide any evidence to support their exceptions, but continue to labor under the same misconceptions that have plagued their positions throughout this entire process — namely, a lack of understanding regarding the nature of this right and of municipal rights in general.

The facts and evidence presented at the hearing, and discussed in Avimor's post-trial briefing, support the Hearing Officer's conclusion to grant Permit No. 63-32061 and to find that Avimor is a municipal provider. Protestants have failed to provide any evidence to show that the Hearing Officer was incorrect. Accordingly, the Protestants Exceptions should be denied.

ARGUMENT

I. There is Sufficient Water in the Willow Creek Drainage to Fulfill This Water Right

At the hearing, Avimor presented un rebutted technical evidence showing that there is sufficient water in the Willow Creek aquifer and that recharge to the aquifer would exceed diversions. *The Protestants have not provided any evidence to the contrary.* The evidence on this point is summarized as follows:

Dr. Christian Petrich and Mr. Terry Scanlan have extensively studied the Willow Creek aquifer and the surrounding aquifers (Exs. 26-29). Indeed, Mr. Scanlan has been studying the Willow Creek aquifer since the mid-1990s. They surveyed all the nearby water rights, including those of Protestants. Ex. 30. ... The expert hydrologists' opinion is that Willow Creek water rights will not be injured. ... Other water rights in the Northern Margin aquifer, which provides water to the Eagle area, will not be injured by the proposed withdrawals from the Willow Creek aquifer. *There is no contrary evidence in this Record.* Protestants questioned whether there was water available in the Payette drainage for appropriation, but offered no evidence that the Payette is over-appropriated. *The Director has ruled that it is not. See Westrock Final Order, ¶ 31.* ...

Protestants offered no proof or expert testimony to demonstrate that the tests Dr. Petrich and Mr. Scanlan conducted were inadequate to determine the capacity or transmissivity of the Willow Creek aquifer. ... Ten years of water level sampling has been collected on the Lynn Wells in the Willow Creek aquifer. Ex. 38; Terry Scanlan Testimony. *These data show that there has been no significant decline on the Willow Creek aquifer over a ten-year period* ... Dr. Christian Petrich Testimony. ...

Dr. Petrich also testified that he prepared an estimate of the recharge to the Willow Creek aquifer. Using conservative infiltration estimates, and ignoring any infusion of water from geothermal sources or leakage from the Northern Margin and other Foothills aquifers, Dr. Petrich determined that the recharge

potential exceeded the combined withdrawals of the Lynn water right and Avimor's proposed water right. See also Ex. 58. Protestants offered no contrary evidence.

Avimor Post-Hearing Br. at 12-13 (emphasis added). These undisputed facts clearly support the Recommended Order. This investigation shows that the 3500 acre-foot annual recharge is a conservative estimate that does not consider such information as "infusion of water from geothermal sources or leakage from the Northern Margin and other Foothills aquifers." *Id.* Protestants have failed to provide any contrary evidence.

Avimor has also demonstrated, without any contrary evidence being provided, that its water use will include "very significant and unprecedented water conservation measures." *Id.* at 17. Indeed, "This project is at the forefront of water conservation efforts and is a leader in that arena." *Id.* The Protestants go on to misstate Avimor's intended use of this water, by claiming that this right combined with Water Right No. 63-31966 will lead to a 24/7 365 days per year pumping of 10 cfs., from the two aquifers. This issue was summarized in Avimor's post-hearing brief, *id.* at 17-18; and in Avimor's Response to the Protestant's post-hearing brief:

Protestants' only argument about the conservation of water resources in their closing brief is that Avimor has applied for 10 cfs, but only "needs" 2.3 cfs for its planned community. This evinces a misunderstanding of municipal rights. The 2.3 cfs calculation is an average of summer and winter usage for the project. The 10 cfs is made up of two separate water rights: one from the Sandy Hill aquifer, and the other from the Willow Creek aquifer. The 5 cfs right from the Willow Creek aquifer is intended to be used in part to recharge the Sandy Hill aquifer. It also will be used to meet peak demands and fire flow demands necessary for IDEQ approval. This is not an excessive appropriation of water, but is necessary to meet the needs of the development.

Id. at 10. Protestants' confusion over maximum diversion rates and peak demand does not mean that the Director should ignore Avimor's substantial water conservation measures. See also Ex. 7 (Development Agreement with Ada County.)

II. Avimor's Application Does Not Conflict with the Local Public Interest

Protestants argue as though the Willow Creek aquifer is the only source of water for the entire northern Ada County area. This contention is wrong. The Willow Creek aquifer is not the only aquifer in the area. The Willow Creek aquifer is hydrological distinct from the other aquifers in the Eagle area. Withdrawals from the Willow Creek aquifer wells under this permit will not affect the other primary aquifers that supply water to the Eagle area.

Furthermore, Avimor has taken measures to ensure that its impact on the aquifer is minimal. Avimor entered into an agreement with M3 which provide that Avimor will use water from the Willow Creek aquifer and that M3 will not. Rather, M3 will only seek water rights from the Northern Margin Aquifer. Testimony of Bob Taunton, Exhibits 5 & 6.

Protestants complain about unknown impacts to the aquifer as an alleged geothermal resource. However, the undisputed testimony at the hearing shows that the Willow Creek Aquifer is not a geothermal source. *See Avimor Response to Protestants Post-Hearing Br.* at 8 (citing to the undisputed testimony of Terry Scanlan recognizing that “While there are additional inflows to the Willow Creek aquifer from another unknown geothermal aquifer, *the Willow Creek aquifer is not itself a geothermal resource*”) (emphasis added). Petitioners continue to make the same arguments without any factual support.

III. The Hearing Officer Properly determined that Avimor is a Municipal Provider

Protestants assert that aquifer storage and recharge cannot be a part of a municipal water right. The aquifer storage and recharge component of Avimor's water rights is merely a mechanism for moving the water from the Willow Creek aquifer to the Sandy Hill aquifer. *See, supra.* All the water diverted from both Willow Creek and Sandy Hill aquifers will be used for

municipal purposes. Furthermore, contrary to the Protestant's assertion, the right is not "solely" for recharge, but is for direct use as well. *See, supra.*

Finally, Protestants object to the condition requiring proof of municipal supplier approval from DEQ at the time of application of proof of beneficial use. The Department has historically recognized the practical need to have all necessary permits in place before proof of beneficial use is provided, but not necessarily at the time of the application. The former Director has held in other applications that the permit is properly conditioned on showing proof of municipal status at the time of the application for beneficial use is made. This holding supports the Department's historical practice. *In the Matter of Application for Permit No. 65-22357 in the Name of Westrock Associates LLC* (Dec. 20, 2002) (Conclusion of Law 5, Condition 8.c). Contrary to Protestants' argument this is not a new policy adopted just for Avimor.

IV. Other Claims Raised by Protestants are, Likewise, Without Merit

A. The Court properly Denied the Protestants Motion to Disqualify

The Hearing Officer adequately addressed the Protestants Motion to Disqualify and they have shown no basis for their untimely motion to disqualify the Hearing Officer, especially considering Protestants disqualified three other proposed hearing officers as a matter of convenience. No one familiar with water rights would have been acceptable to Protestants.

B. Avimor's Application was Made in Good Faith and Not for Delay or Speculative Purposes

The Protestants' argument that this is a speculative application demonstrate a fundamental misunderstanding of municipal water rights. Avimor previously addressed Protestants arguments for the Hearing Officer's consideration:

Protestants' argument derives from their misunderstanding of municipal water rights. Protestants are stuck on the concept that a municipal water right assumes a 24 hour/day, 7 day/week, 365 day/year pumping at that maximum

diversion rate. Protestants do not understand municipal water rights. Municipal water rights are established so that the municipal provider has a maximum diversion rate to meet exigencies. Those exigencies are not the anticipated future needs, which so confuses Protestants. The exigencies include fire flow protection, peak day and hour demand, and, in the instance of this right, the ability to recharge the Sandy Hill aquifer.

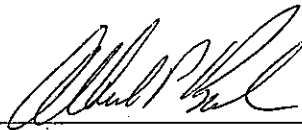
Avimor Resp. to Protestants Post-Hearing Br. at 12-13.

CONCLUSION

Protestants' Exceptions are nothing more than a relabeling of their Petition for Rehearing. All of Protestants' arguments were addressed to the Hearing Officer before the Recommended Order was rendered. The Hearing Officer has already reviewed and considered these arguments and has recognized that they are meritless. Protestants' claims are without merit and demonstrate a lack of understanding of the application and of municipal water rights. Accordingly, the Exceptions should be denied, and a final order should be entered affirming the hearing officer's decision (with the clarifications requested on Applicant's Exceptions).

DATED this 1st day of May, 2007.

BARKER ROSHOLT & SIMPSON, LLP



Albert P. Barker
Attorneys for SunCor Idaho, LLC now known as
Avimor LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 1st day of May, 2007, I served a true and correct copy of the foregoing AVIMOR LLC'S RESPONSE TO PROTESTANTS' EXCEPTIONS on the person(s) listed below, in the manner indicated below:

Idaho Department of Water Resources
322 E. Front Street
P. O. Box 83720
Boise, ID 83720-0098


☐ U.S. Mail, Postage Prepaid
☐ Facsimile **287-6700**
☐ E-Mail
☒ Hand Delivery

Judith M. Brawer
1502 N. 7th Street
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4122 Homer Road
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Albert P. Barker

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APR 20 2007

**DEPARTMENT OF
WATER RESOURCES**

Attorneys for Avimor LLC, formerly SunCor Idaho LLC

**BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)	
FOR PERMIT NO. 63-32061 IN THE)	EXCEPTIONS TO
NAME OF SUNCOR IDAHO, LLC)	RECOMMENDED ORDER
_____)	
)	

COMES NOW, the applicant Avimor LLC, by and through its attorneys of record, and pursuant to rule of procedure 720.02 hereby submits the following exceptions to the Recommended Order of the hearing officer.

The Recommended Order was entered by the Hearing Officer on March 13, 2007. However, the Protestants' brought a petition for reconsideration of the Recommended Order. The Petition for Reconsideration was denied on April 4, 2007. Under Rule 720.02.b the parties have 14 days after the service date of the denial of a petition for reconsideration to file exceptions with the director.

Accordingly, Avimor LLC files the following exceptions. These exceptions are generally matters of clarification and suggestions of how better to implement the findings of facts and conclusions of the hearing officer.

Exception 1: In Finding of Fact number 7 the Hearing Officer accurately determined that SunCor Idaho LLC subsequently has been renamed Avimor LLC. However, the Hearing Officer's Order recommends approval of the application in the name of SunCor Idaho LLC. Because of the name change, the permit should be approved in the name of Avimor LLC rather than SunCor Idaho LLC.

Exception 2: Finding of Fact number 11 states that there was no evidence to show how much water could be placed in groundwater storage as a part of aquifer storage in recovery. In fact, Applicant's exhibit 29 at page 14 estimates that 1750 acre feet of recoverable volume in the upper 50 feet of the Sandy Hill aquifer. This estimate provides at least an implication of the volume available for aquifer recharge, storage and recovery purposes.

Exception 3: Finding of Fact number 17, and Conclusion of Law number 16, states that the point of diversion is in Basin 65 in the Willow Creek drainage, and that the place of use is in Basin 63. In fact, the surface of the well head is in Basin 63. However, the water supply comes from the Willow Creek aquifer which is tributary to Basin 65. This exception is submitted as a point of clarification.

Exception 4: Conclusions of law number 9 and 15 affect the language selected by the Hearing Officer for Condition number 11. Essentially the Hearing Officer has concluded that large common areas should not be irrigated unless reclaimed, waste water is first used on the common areas. He then concluded that permit number 63-31966

potentially could be used to evade the limitations on use of water to irrigate large common areas. Therefore, the Hearing Officer imposed both Conditions 11 and 13 to the permit.

Applicant wishes to make it clear that applicant does not object to the requirement to utilize the reclaimed water on common areas prior to utilizing any of the ground water on the common areas. That is exactly the approach the applicant has taken with its design of its water system. It should be noted that the actual ability to reuse waste water on the common areas is subject to approval of a sister agency, the Department of Environmental Quality. Applicant will work with DEQ in good faith to obtain its approval for the proposed reuse.

Applicant believes that the conditions imposed in Conditions number 11 and 13 are not narrowly tailored to achieve the result that the Hearing Officer sought to achieve, that is requiring use of reclaimed waste water on the common area prior to use of water from this water right. It is likely that, particularly in the early stages of the development, there may not be enough waste water during peak demand for waste water to be the only source of water for the common areas. The better way to deal with the Hearing Officer's conclusion that waste water should first be used for the common area (Conclusion of law number 9) is to revise Condition number 11. Condition number 11 should be revised to insure that common area use of water from this water right is secondary and supplementary to use of the reclaimed waste water. Second, Condition number 11 should recognize that there may be some common areas which are isolated from the other common areas and isolated from the waste water treatment plant and associated reuse lines in a way that those isolated parcels might not have the ability to utilize the waste

water directly on the property. Irrigation of isolated parcels from this right would not affect the total amount of water used, because the reclaimed waste water still must be used on the main common areas first, before any of the water from this right is used on those main common areas.

Accordingly, Applicant suggests that Condition number 11 be revised to read as follows:

The permit holder shall fully utilize treated waste water for irrigation purposes on all common areas, including parks, playgrounds and golf courses, prior to applying any water to such common area parcels from water under this permit. This condition shall not apply to isolated common area parcels not connected to the waste water reuse system. The applicant shall provide the department for its approval a schematic of the waste water reuse system, identifying such isolated parcels not subject to this condition.¹

Exception 5: Condition number 13 limits the ability to use the water for recharge to the base winter time flows and volumes diverted under permit 63-31966 during the non-irrigation season. The stated purpose for this condition was to ensure that the water use for recharge under this permit could not then be diverted under permit 63-31966 for irrigation of common areas and other large parcels. See Conclusion of Law number 15.

This condition unduly restricts the ability of the applicant to use the water for recharge. In fact, it will almost eliminate the recharge component of the right. Condition number 11 may prohibit annual recharge at rates and volumes sufficient to support municipal demands in the summer months for domestic, commercial, and residential lot irrigation purposes. Condition number 11 also prohibits water management strategies such as short-duration, high-flow recharge that may be advantageous for operational

¹ We have eliminated the term "large parcels" in the proposed condition as vague, replaced it with the more commonly understood and utilized term "common areas", and provided a definition providing examples. The term "large parcels" is also unnecessary in light of the restrictions in Condition number 12.

purposes. The non-irrigation season is the most likely time when the water would be recharged to the aquifer. During the irrigation season the water is more likely to be directly applied to other beneficial uses.

Rather than restrict the permit holder's ability to recharge in the non-irrigation season, a better solution would be to require waste water to be used on the common areas as the primary source of irrigation water, and only allow the recharged water to be used as a secondary source. This could be done with the same Condition 11 imposed on water directly delivered to the property. Applicant supports the goal of the Hearing Officer to utilize the waste water to the fullest extent possible on the common areas. Applicant suggests that Condition number 13 be revised to make any water delivered for recharge subject to the same conditions as in 11.

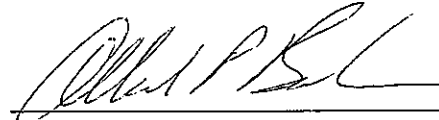
Accordingly, Condition number 13 replaced entirely with the following:

Water delivered for recharge under this right and diverted from the points of diversion authorized by permit number 63-31966 for use on common areas shall be subject to the condition of that treated waste water shall be used on these common areas as required by Condition 11.

These modifications more directly deal with the Hearing Officer's concern that withdrawal of water under permit 63-31966 could be used to avoid the requirements of Condition number 11. This change to Condition number 13 also will encourage more efficient and practical use of the recharge component of this water right so that water can be recharged in the non-irrigation season when it is most practical to do so.

DATED this 18th day of April, 2007.

BARKER ROSHOLT & SIMPSON, LLP

A handwritten signature in black ink, appearing to read 'Albert P. Barker', written over a horizontal line.

Albert P. Barker

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 18th day of April, 2007, I served a true and correct copy of the EXCEPTION TO RECOMMENDED ORDER upon:

Director

Idaho Department of Water Resources
322 E. Front Street
P. O. Box 83720
Boise, ID 83720-0098

☐ U.S. Mail, Postage Prepaid
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Judith M. Brawer

1502 N. 7th St.

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Attorney for Davidson, Mullins & Baldwin

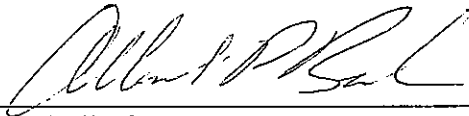
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Albert P. Barker

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APR 18 2007
DEPARTMENT OF
WATER RESOURCES

Attorneys for Avimor LLC, formerly SunCor Idaho LLC

BEFORE THE DEPARTMENT OF WATER RESOURCES
FOR THE STATE OF IDAHO

IN THE MATTER OF APPLICATION
FOR PERMIT NO. 63-32061 IN THE
NAME OF SUNCOR IDAHO, LLC

)
) **EXCEPTIONS TO**
) **RECOMMENDED ORDER**
)
)
)

COMES NOW, the applicant Avimor LLC, by and through its attorneys of record, and pursuant to rule of procedure 720.02 hereby submits the following exceptions to the Recommended Order of the hearing officer.

The Recommended Order was entered by the Hearing Officer on March 13, 2007. However, the Protestants' brought a petition for reconsideration of the Recommended Order. The Petition for Reconsideration was denied on April 4, 2007. Under Rule 720.02.b the parties have 14 days after the service date of the denial of a petition for reconsideration to file exceptions with the director.

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Exception 1: In Finding of Fact number 7 the Hearing Officer accurately determined that SunCor Idaho LLC subsequently has been renamed Avimor LLC. However, the Hearing Officer's Order recommends approval of the application in the name of SunCor Idaho LLC. Because of the name change, the permit should be approved in the name of Avimor LLC rather than SunCor Idaho LLC.

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potentially could be used to evade the limitations on use of water to irrigate large common areas. Therefore, the Hearing Officer imposed both Conditions 11 and 13 to the permit.

Applicant wishes to make it clear that applicant does not object to the requirement to utilize the reclaimed water on common areas prior to utilizing any of the ground water on the common areas. That is exactly the approach the applicant has taken with its design of its water system. It should be noted that the actual ability to reuse waste water on the common areas is subject to approval of a sister agency, the Department of Environmental Quality. Applicant will work with DEQ in good faith to obtain its approval for the proposed reuse.

Applicant believes that the conditions imposed in Conditions number 11 and 13 are not narrowly tailored to achieve the result that the Hearing Officer sought to achieve, that is requiring use of reclaimed waste water on the common area prior to use of water from this water right. It is likely that, particularly in the early stages of the development, there may not be enough waste water during peak demand for waste water to be the only source of water for the common areas. The better way to deal with the Hearing Officer's conclusion that waste water should first be used for the common area (Conclusion of law number 9) is to revise Condition number 11. Condition number 11 should be revised to insure that common area use of water from this water right is secondary and supplementary to use of the reclaimed waste water. Second, Condition number 11 should recognize that there may be some common areas which are isolated from the other common areas and isolated from the waste water treatment plant and associated reuse lines in a way that those isolated parcels might not have the ability to utilize the waste

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Accordingly, Applicant suggests that Condition number 11 be revised to read as follows:

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This condition unduly restricts the ability of the applicant to use the water for recharge. In fact, it will almost eliminate the recharge component of the right. Condition number 11 may prohibit annual recharge at rates and volumes sufficient to support municipal demands in the summer months for domestic, commercial, and residential lot irrigation purposes. Condition number 11 also prohibits water management strategies such as short-duration, high-flow recharge that may be advantageous for operational

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purposes. The non-irrigation season is the most likely time when the water would be recharged to the aquifer. During the irrigation season the water is more likely to be directly applied to other beneficial uses.

Rather than restrict the permit holder's ability to recharge in the non-irrigation season, a better solution would be to require waste water to be used on the common areas as the primary source of irrigation water, and only allow the recharged water to be used as a secondary source. This could be done with the same Condition 11 imposed on water directly delivered to the property. Applicant supports the goal of the Hearing Officer to utilize the waste water to the fullest extent possible on the common areas. Applicant suggests that Condition number 13 be revised to make any water delivered for recharge subject to the same conditions as in 11.

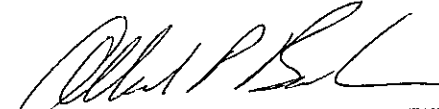
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DATED this 18th day of April, 2007.

BARKER ROSHOLT & SIMPSON, LLP

A handwritten signature in black ink, appearing to read 'Albert P. Barker', written over a horizontal line.

Albert P. Barker

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that on this 18th day of April, 2007, I served a true and correct copy of the EXCEPTION TO RECOMMENDED ORDER upon:

Director
Idaho Department of Water Resources
322 E. Front Street
P. O. Box 83720
Boise, ID 83720-0098

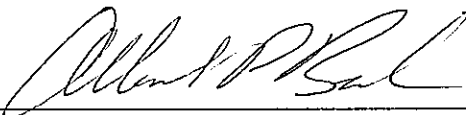
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Attorney for Protestants

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APR 17 2007

**DEPARTMENT OF
WATER RESOURCES**

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION) **PROTESTANTS' EXCEPTIONS TO**
FOR PERMIT NO. 63-32061 IN THE) **ORDER DENYING PETITION FOR**
NAME OF SUNCOR IDAHO, LLC) **RECONSIDERATION OF**
_____) **RECOMMENDED ORDER**

Protestants ROD DAVIDSON, LYLE MULLINS AND GARTH BALDWIN¹, by and through their attorney of record, Judith M. Brawer, hereby file Protestants' Exceptions to Order Denying Petition for Reconsideration of Recommended Order in the above captioned case pursuant to Idaho Statute 67-5244.

The Protestants' Exceptions to the Hearing Officer's Order denying their Petition for Reconsideration of the Recommended Order are based on the fact that the Order Denying Petition for Reconsideration did not discuss any of the issues or concerns identified in Protestants' Petition for Reconsideration. These issues and concerns include, but are not limited to, that the Findings of Facts do not support the Conclusions of Law, that the Findings of Fact and Conclusions of Law show that SunCor does not qualify as a "municipal provider," and that there are a number of issues raised by Protestants at the hearing and in their post hearing briefs that the Recommended Order does not address.

¹ The Recommended Order states that protestant Baldwin lives on Eagle Island. This is not true. Protestant Baldwin is a long time resident of Horseshoe Bend, which is much closer to the project area than Eagle Island.

As discussed in detail, below, the Order Denying Petition for Reconsideration erroneously concludes that the protestants did not raise any issues that need to be changed or that the hearing officer has not previously considered.

ARGUMENT

- I. **THE RECOMMENDED ORDER ERRONIOUSLY CONCLUDES THAT THE WATER RIGHT WILL NOT REDUCE THE QUANTITY OF WATER UNDER EXISTING WATER RIGHTS, THAT THE WATER SUPPLY ITSELF IS SUFFICIENT FOR THE PURPOSES FOR WHICH IT IS SOUGHT TO BE APPROPRIATED AND THAT IT IS NOT CONTRARY TO THE CONSERVATION OF WATER RESOURCES WITHIN THE STATE OF IDAHO.**

When deciding whether to grant (or deny) a water right permit, the Idaho Department of Water Resources (Department) must determine whether the application satisfies a number of criteria. In particular, where the proposed use is such that, among other things, it will reduce the quantity of water under existing water rights, that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or that it is contrary to conservation of water resources within the state of Idaho, the director of the Department may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. *Idaho Code* § 42-203A(5).

Here the Recommended Order's Findings of Fact do not support its conclusions that SunCor's water right will not reduce the quantity of water under existing water rights, that the water supply is sufficient for the purposes for which it is sought to be appropriated and that it is not contrary to the conservation of water resources within the state of Idaho. *See Recommended Order, pp. 9-10, Conclusions of Law #s 4, 5, 11.* Indeed, the facts lead to the opposite conclusion.

First, the Findings of Fact state that “[t]he quantity of water available for appropriation in the Willow Creek drainage is not known.” *Recommended Order*, p. 8, *Finding of Fact*, # 24; see *Protestants’ Post-Hearing Brief*, p. 11. In its rush to secure its water supply, SunCor simply did not conduct adequate testing to determine the capacity of the Willow Creek aquifer. *Protestants’ Post-Hearing Brief*, p. 11. Thus, the Recommended Order’s conclusions that the water supply is sufficient for the purposes for which it is sought to be appropriated and that the proposed permit will not reduce the quantity of water under existing water rights are not supported by the facts. At a minimum, it is not known whether the water supply is sufficient or whether the quantity of water under existing water rights will be reduced. Based on these uncertainties alone, the permit should be rejected until adequate testing of the capacity of the Willow Creek aquifer is completed.

In addition, as explained in detail in Protestants’ posting-hearing briefs, and as recognized in the Recommended Order’s Findings of Fact, the proposed water right diversion of 3,620 acre-feet per year from the Willow Creek aquifer exceeds the annual ground water recharge from precipitation, estimated to be approximately 3,500 acre-feet. See *Protestants’ Post-Hearing Brief*, p. 6; *Recommended Order*, pp. 7-8. Thus, pursuant to the Order’s own Findings of Fact, the proposed water right in and of itself will result in the depletion of the Willow Creek aquifer by at least 120 acre-feet per year.²

Further, the Recommended Order does not address the amount of water already being withdrawn from the Willow Creek aquifer from other diverters, in particular the Lynn family

² The Findings of Fact also rejected SunCor’s assertion that canal systems in the Boise and Payette River Valleys may recharge ground water in the area of the proposed points of diversion because the canals do not overlie the recharge area and are both located several miles from the Willow Creek drainage where the wells are proposed. See *Recommended Order*, p. 8, *Finding of Fact* # 21.

diversions, which are estimated to total approximately 1,480 acre-feet per year. *See Protestants' Post-Hearing Brief, p. 6.* Thus, the proposed water right will actually result in the depletion of the Willow Creek aquifer by approximately 1,600 acre-feet per year (1,480 + 120). Accordingly, the proposed water right will result in the unlawful "mining" of the Willow Creek aquifer because the pumping from SunCor's wells to satisfy its water right will withdraw ground water "beyond the reasonably anticipated average rate of future natural recharge." *Idaho Code, § 42-237a(g); Baker v. Ore-Idaho Foods, Inc., 95 Idaho 575, 584 (1973).*

The fact that the quantity of water available for appropriation in the Willow Creek drainage is unknown and the demonstrated aquifer depletion are also contrary to the Order's Finding of Fact that [t]he applicant's estimates of water availability versus existing water use show that there is water available for the applicant's use in excess of the amount of water presently used under the existing water rights in the Willow Creek drainage." *See Recommended Order, p. 8, Finding of Fact # 23.* Instead, the facts show that there is no such an excess of water. Thus, the depletion of the Willow Creek aquifer will directly impact the Lynn family's water right because the aquifer's water supply is inadequate to meet the needs of both appropriators (SunCor and the Lynn Family). Such aquifer depletion means that there is not adequate water in the aquifer to meet the needs of SunCor's proposed water right, and is also contrary to the conservation of water resources within the State of Idaho.

In fact, the Recommended Order did not address the issue of the conservation of water resources. First, as explained above, the amount of the proposed appropriation exceeds the annual recharge of the aquifer and will thus result in the "mining" of the Willow Creek aquifer. This, in and of itself, is contrary to the conservation of water resources. Second, as raised at the hearing and in Protestants' Post-Hearing Brief, SunCor has applied for a total of 10 cfs despite

the fact that it claims to only need approximately 2.3 cfs to meet the needs of the Avimor planned community's "core area." *See Protestants' Post-Hearing Brief, p. 12.* Such excessive appropriation of water is contrary to the conservation of water resources within the state of Idaho.

Despite its findings that the amount of water available in the Willow Creek aquifer is unknown and that the amount of diversion will greatly exceed the amount of recharge, the Recommended Order does not reject the permit or partially approve and grant the permit for a smaller quantity of water than applied for. Nor do the conditions placed upon the permit – which merely address for what purpose the diverted water can be used for – in any way address these issues because the water right is granted for the full amount requested. *See Recommended Order, p. 10, Conclusion of Law #9; see also Id., p. 13, Order # 11.*

II. THE RECOMMENDED ORDER ERRONEOUSLY CONCLUDES THAT THE APPLICATION DOES NOT CONFLICT WITH THE LOCAL PUBLIC INTEREST.

A. The Limitations Placed on the Permit Application Does Not Address the Identified Conflict With the Local Public Interest.

The Recommended Order states that "IDWR has the authority,...in considering the local public interest and conservation of water of the state of Idaho, to limit the use of water if the supply of water is finite, and there are significant anticipated uses of the finite resources in the near future." *Recommended Order, p. 11.* The Recommended Order further concludes that "[i]t would not be in the local public interest to allow a single large development entity to hold water rights to a significant portion of a limited public resource that may be needed to supply the culinary and potable water needs of future anticipated development." *Recommended Order, p. 10, Conclusion of Law #9.* This conclusion is based on the finding that there is significant additional residential development proposed in the vicinity of SunCor's proposed development,

that the amount of recharge is unknown because the area where water is proposed to be appropriated is “hydrologically unexplored” and potential sources of significant recharge are remote from the area where ground water is sought to be appropriated. *Id.*, *Conclusion of Law* #8; *see also Id.*, p. 8, *Finding of Fact* # 22.

In an attempt to make the application comply with the local public interest requirement, the Hearing Officer attached one limitation to the water right. *See Recommended Order*, p. 10, *Conclusions of Law* #s 9, 10; *see also Id.*, p. 13, *Order* #s 11. This limitation is that “[c]ommon areas, parks, schools, grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.” *Recommended Order*, p. 13, *Order* # 11.

Yet, as stated above, this limitation in no way addresses the local public interest concern raised by in the Recommended Order because it does not limit the amount of water that can be diverted from the Willow Creek aquifer – that amount remains at the applied for five cfs. Thus, the application still conflicts with the local public interest because a single large development entity (SunCor) will still be allowed to hold water rights to a significant portion of a limited public resource (10 cfs total water diversions) that may be needed to supply the culinary and potable water needs of future anticipated development.

B. The Recommended Order Does Not Address Other Issues Protestants’ Identified as Conflicting with the Local Public Interest.

In their post hearing briefs, Protestants raised a number of relevant impacts relating to the local public interest that arose in the context of this water right permit application. *See Protestants’ Post-Hearing Brief*, pp. 9-11. In particular, based on the testimony at the hearing and on the record, Protestants raised issues including, but not limited to: the water quality and

arsenic levels at both the point of diversion and place of use; the effect on the local economy of the watershed or local area that is the source of the proposed water but not the place of use; the wholly unknown and unstudied impact that the water withdrawal may have on the geothermal resource of the Willow Creek aquifer; the impact of the water diversion and use on native wildlife, birds and sensitive plants; and the need for a detailed hydrological study of the water resources in the area prior to the approval of additional municipal and other water right permit applications. *Id.* Nowhere does the Recommended Order address these impacts, which are directly relevant to the local public interest. As the legislative history of the 2003 amendment to the local public interest test states: "Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effects of such use on the availability of water for alternative uses of water that might be made within a reasonable time." *Statement of Purpose, H.B. 284 (2003)*.

In particular, Idaho's geothermal resources are recognized as so important that there is a separate Geothermal Resources Act, which has separate permitting requirements for diversions of geothermal resources. *Idaho Code Title 42, Chapter 40*. As explained in Protestants' post hearing briefs, SunCor's own consultants testified that the water from the Willow Creek aquifer is warm due to geothermal influences, but that SunCor doesn't know, because it did not analyze, whether or to what extent its' pumping of the aquifer would affect this geothermal resource. *Protestants' Post-Hearing Brief, p. 10*. This fact was wholly ignored in the Recommended Order. SunCor's permit should be denied and SunCor required to conduct adequate testing of the Willow Creek aquifer to determine whether it is a geothermal aquifer and the extent to which the proposed diversion will impact this important resource.

III. THE RECOMMENDED ORDER SHOULD HAVE DENIED SUNCOR'S APPLICATION AS A MUNICIPAL PROVIDER.

A. Aquifer Storage And Recovery And Groundwater Recharge Are Not Uses Within The Definition Of "Municipal Purposes."

The Recommended Order concludes that the proposed uses of water identified in SunCor's application do not meet the definition of "municipal purposes." Based on this conclusion, SunCor's application as a municipal provider should be denied.

The Idaho Code defines "municipal provider" as "A corporation or association which supplies water for municipal purposes..." *Idaho Code § 42-202B(5)(c)*. "Municipal purposes" refers to water for residential, commercial, industrial, irrigation of parks and open space, and related purposes..." *Id.*, § 42-202b(6). The Recommended Order concludes that the definition of "municipal purposes" in the Idaho Code "does not expressly recognize aquifer storage and recovery as a use of water, and also does not expressly recognize ground water recharge as a use of water." *Recommended Order, p. 10, Conclusion of Law, # 12*. The Order further concludes that "[a]quifer storage and recovery is not assumed to be a sub-use within the definition of 'municipal purposes.' Aquifer storage and recovery can be recognized, however, if sufficient evidence is presented to insure that a municipal provider's diversion is limited to the amount of water placed and retained in aquifer storage. Evidence of placement and retention was not presented at the hearing." *Id.*, *Conclusions of Law, # 13*. No legal authority was provided for this conclusion. Nor was any legal authority provided for the conclusion that ground water recharge can be expressly recognized as a municipal sub-use. *Id.*, *Conclusions of Law, # 14*.

Thus, because the application is proposed solely for the purposes of aquifer storage and recovery and ground water recharge of the Spring Valley aquifer, it does not meet the definition of “municipal purposes” and thus SunCor does not qualify as a municipal provider for the purpose of this water right application.

B. SunCor Did Not Otherwise Meet its Burden to Demonstrate That it is a Municipal Provider.

Protestants’ post-hearing briefs raised the issue of the Department’s arbitrary determination to ignore the requirement of Idaho Code § 42-202(2) that a municipal provider submit sufficient information and documentation with its application to establish that it qualifies as a municipal provider, and that its relatively new “policy” of allowing a purported municipal provider to postpone submitting the required information for five years – until it submits proof of beneficial use – violates the plain language of the statute. *Protestants’ Post-Hearing Brief*, pp. 15-17. Nowhere does the Recommended Order address this issue. Protestants thus renew these claims here.

IV. THE RECOMMENDED ORDER DOES NOT ADDRESS ADDITIONAL CLAIMS RAISED IN PROTESTANTS POST-HEARING BRIEFS.

A. Motion to Disqualify Hearing Officer for Cause.

The Recommended Order does not address Protestants’ motion to reconsider the denial of their Motion to Disqualify Hearing Officer for Cause, made in their Post-Hearing Brief. *Protestants’ Post-Hearing Brief*, pp. 15-16.

Prior to the hearing, Protestants filed a Motion to Dismiss Hearing Officer for Cause. At the hearing, the Hearing Officer denied this motion without explanation of the reasons for such denial. These reasons were not provided until the Recommended Order, which states that the “[r]easons for denial include the late filing of the motion,...an insufficient showing that the

hearing officer was biased due to prior involvement in policies of IDWR and a lack of any showing that signing a prior permit of the applicant on behalf of the Director of IDWR constitutes bias of the hearing officer.” *Recommended Order*, p. 1.

In their Post-Hearing Brief, Protestants requested that the Hearing Officer reconsider its order denying Protestants’ Motion based on the testimony at the hearing that the Hearing Officer was the one who approved the unofficial - and unlawful - “policy” of allowing a purported municipal provider to postpone submitting the required information and documentation. *Protestants’ Post-Hearing Brief*, pp. 15-16. The Recommended Order does not address this specific request for reconsideration, and does not discuss the demonstrated bias of the Hearing Officer based on the testimony at the hearing.

B. SunCor Did Not Meet its Burden to Demonstrate That its’ Application was Made In Good Faith, and is Not Made for Delay or Speculative Purposes.

The Recommended Order also does not address Protestants’ claim that SunCor did not meet its burden that its application is made in good faith, and is not made for delay or speculative purposes. *See Protestants’ Post-Hearing Brief*, pp. 7-8. As explained in its post hearing briefs, SunCor asserts that it will use only 2.3 cfs for the entire “core area” of the Avimor planned community. Yet, if the Department approves this application, SunCor will have two water right permits totaling 10 cfs – far exceeding its stated need. SunCor itself claimed that its permit application did not include reasonably anticipated future needs or a planning horizon, yet it has not explained how and when it will use the excess 7.7 cfs. SunCor’s permit application for a water right in such excess of its stated need is both bad faith and speculation, and further does not satisfy the requirement that an appropriation of water must be for a beneficial use

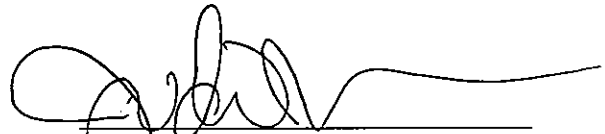
The Recommended Order merely concludes that the application was made in good faith and not for delay or speculative purposes, without providing any findings of fact or explanation for this conclusion. *Recommended Order, p. 10, Conclusion of Law # 6.*

CONCLUSION

For the foregoing reasons, Protestants respectfully file this Exceptions to Order Denying Petition for Reconsideration of the Recommended Order.

Dated this 17th day of April, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'J. Brawer', is written over a horizontal line.

Judith M. Brawer
Counsel for Protestants' Davidson,
Mullins and Baldwin

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April 2007, I caused a true and correct copy of the foregoing PROTESTANTS' EXCEPTIONS TO ORDER DENYING PETITION FOR RECONSIDERATION OF RECOMMENDED ORDER to be served on the following persons:

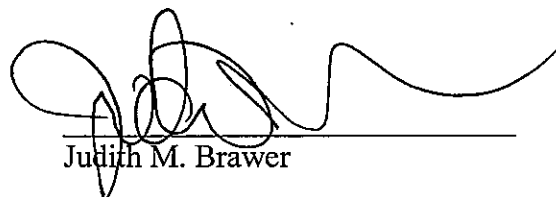
Via hand deliver:

Dave Tuthill, Director
IDWR
322 E. Front Street
Boise, ID 83702

Via first class mail postage pre-paid

Albert P. Barker
BARKER ROSHOLT & SIMPSON
1010 W. Jefferson
Boise, Idaho 83701-2139

Phillip Fry
4122 Homer Road
Eagle, ID 83616



Judith M. Brawer



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street • P.O. Box 83720 • Boise, Idaho 83720-0098

Phone: (208) 287-4800 • Fax: (208) 287-6700 • Web Site: www.idwr.idaho.gov

April 4, 2007

C. L. "BUTCH" OTTER
Governor

DAVID R. TUTHILL, JR.
Interim Director

Re: In the matter of application for permt no. 63-32061, in the name of SunCor
Idaho, LLC

Dear Interested Parties:

The Department of Water Resources has issued the enclosed **Order Denying Petition for Reconsideration** pursuant to section 67-5243, Idaho Code. The enclosed information sheet explains available procedures to follow in response to this order.

If you have any questions, please call me at (208) 287-4942.

Sincerely,

A handwritten signature in black ink that reads "Deborah J. Gibson". The signature is fluid and cursive, with the first name being the most prominent.

Deborah J. Gibson
Admin. Assistant
Water Allocation Bureau

Enclosures

Cc: Western Region

EXPLANATORY INFORMATION

The accompanying order is an **Order Denying Petition for Reconsideration** of the "recommended order" issued previously in this proceeding by the department pursuant to section 67-5243, Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after the service date of this denial of petition for reconsideration of the recommended order, any party may in writing support or take exceptions to any part of the recommended order and may file a brief in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to the proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

Section 67-5246(5), Idaho Code, provides as follows:

Unless a different date is stated in a final order, the order is effective fourteen (14) days after its issuance if a party has not filed a petition for

reconsideration. If a party has filed a petition for reconsideration with the agency head, the final order becomes effective when:

- (a) the petition for reconsideration is disposed of; or
- (b) the petition is deemed denied because the agency head did not dispose of the petition within twenty-one (21) days.

APPEAL OF FINAL ORDER TO DISTRICT COURT

Pursuant to sections 67-5270 and 67-5272, Idaho Code, any party aggrieved by the final order or orders previously issued in this case may appeal the final order and all previously issued orders in this case to district court by filing a petition in the district court of the county in which:

- i. A hearing was held,
- ii. The final agency action was taken,
- iii. The party seeking review of the order resides, or
- iv. The real property or personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of the issuance of the final order. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the order under appeal. See Section 67-5274, Idaho Code.

Judith M. Brawer (ISB # 6582)
1502 N. 7th Street
Boise, ID 83702
208-871-0596 (phone)
208-343-2070 (fax)

RECEIVED

MAR 27 2007

DEPARTMENT OF
WATER RESOURCES

Attorney for Protestants

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR PERMIT NO. 63-32061 IN THE)
NAME OF SUNCOR IDAHO, LLC)
_____)

**PETITION FOR RECONSIDERATION
OF RECOMMENDED ORDER**

Protestants ROD DAVIDSON, LYLE MULLINS AND GARTH BALDWIN¹, by and through their attorney of record, Judith M. Brawer, hereby file this Petition for Reconsideration of Recommended Order in the above captioned case pursuant to Idaho Statute 67-5243(3). A petition for reconsideration of a recommended order must be received by the Department of Water Resources within 14 days of the service date of the Order. *Idaho Code* § 67-5243(3). The service date of the Order at issue here is March 13, 2007. Thus, this petition is timely filed.

The Protestants request reconsideration of the Recommended Order for a number of reasons including, but not limited to, that the Findings of Facts do not support the Conclusions of Law, that the Findings of Fact and Conclusions of Law show that SunCor does not qualify as a "municipal provider," and that there are a number of issues raised by Protestants at the hearing and in their post hearing briefs that the Recommended Order does not address.

¹ The Recommended Order states that protestant Baldwin lives on Eagle Island. This is not true. Protestant Baldwin is a long time resident of Horseshoe Bend, which is much closer to the project area than Eagle Island.

ARGUMENT

- I. **THE RECOMMENDED ORDER ERRONIOUSLY CONCLUDES THAT THE WATER RIGHT WILL NOT REDUCE THE QUANTITY OF WATER UNDER EXISTING WATER RIGHTS, THAT THE WATER SUPPLY ITSELF IS SUFFICIENT FOR THE PURPOSES FOR WHICH IT IS SOUGHT TO BE APPROPRIATED AND THAT IT IS NOT CONTRARY TO THE CONSERVATION OF WATER RESOURCES WITHIN THE STATE OF IDAHO.**

When deciding whether to grant (or deny) a water right permit, the Idaho Department of Water Resources (Department) must determine whether the application satisfies a number of criteria. In particular, where the proposed use is such that, among other things, it will reduce the quantity of water under existing water rights, that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or that it is contrary to conservation of water resources within the state of Idaho, the director of the Department may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. *Idaho Code* § 42-203A(5).

Here the Recommended Order's Findings of Fact do not support its conclusions that SunCor's water right will not reduce the quantity of water under existing water rights, that the water supply is sufficient for the purposes for which it is sought to be appropriated and that it is not contrary to the conservation of water resources within the state of Idaho. *See Recommended Order, pp. 9-10, Conclusions of Law #s 4, 5, 11.* Indeed, the facts lead to the opposite conclusion.

First, the Findings of Fact state that "[t]he quantity of water available for appropriation in the Willow Creek drainage is not known." *Recommended Order, p. 8, Finding of Fact, # 24; see Protestants' Post-Hearing Brief, p. 11.* In its rush to secure its water supply, SunCor simply did

not conduct adequate testing to determine the capacity of the Willow Creek aquifer. *Protestants' Post-Hearing Brief*, p. 11. Thus, the Recommended Order's conclusions that the water supply is sufficient for the purposes for which it is sought to be appropriated and that the proposed permit will not reduce the quantity of water under existing water rights are not supported by the facts. At a minimum, it is not known whether the water supply is sufficient or whether the quantity of water under existing water rights will be reduced. Based on these uncertainties alone, the permit should be rejected until adequate testing of the capacity of the Willow Creek aquifer is completed.

In addition, as explained in detail in Protestants' posting-hearing briefs, and as recognized in the Recommended Order's Findings of Fact, the proposed water right diversion of 3,620 acre-feet per year from the Willow Creek aquifer exceeds the annual ground water recharge from precipitation, estimated to be approximately 3,500 acre-feet. *See Protestants' Post-Hearing Brief*, p. 6; *Recommended Order*, pp. 7-8. Thus, pursuant to the Order's own Findings of Fact, the proposed water right in and of itself will result in the depletion of the Willow Creek aquifer by at least 120 acre-feet per year.²

Further, the Recommended Order does not address the amount of water already being withdrawn from the Willow Creek aquifer from other diverters, in particular the Lynn family diversions, which are estimated to total approximately 1,480 acre-feet per year. *See Protestants' Post-Hearing Brief*, p. 6. Thus, the proposed water right will actually result in the depletion of the Willow Creek aquifer by approximately 1,600 acre-feet per year (1,480 + 120). Accordingly,

² The Findings of Fact also rejected SunCor's assertion that canal systems in the Boise and Payette River Valleys may recharge ground water in the area of the proposed points of diversion because the canals do not overlie the recharge area and are both located several miles from the Willow Creek drainage where the wells are proposed. *See Recommended Order*, p. 8, *Finding of Fact # 21*.

the proposed water right will result in the unlawful “mining” of the Willow Creek aquifer because the pumping from SunCor’s wells to satisfy its water right will withdraw ground water “beyond the reasonably anticipated average rate of future natural recharge.” *Idaho Code*, § 42-237a(g); *Baker v. Ore-Idaho Foods, Inc.*, 95 Idaho 575, 584 (1973).

The fact that the quantity of water available for appropriation in the Willow Creek drainage is unknown and the demonstrated aquifer depletion are also contrary to the Order’s Finding of Fact that [t]he applicant’s estimates of water availability versus existing water use show that there is water available for the applicant’s use in excess of the amount of water presently used under the existing water rights in the Willow Creek drainage.” *See Recommended Order*, p. 8, *Finding of Fact* # 23. Instead, the facts show that there is no such an excess of water. Thus, the depletion of the Willow Creek aquifer will directly impact the Lynn family’s water right because the aquifer’s water supply is inadequate to meet the needs of both appropriators (SunCor and the Lynn Family). Such aquifer depletion means that there is not adequate water in the aquifer to meet the needs of SunCor’s proposed water right, and is also contrary to the conservation of water resources within the State of Idaho.

In fact, the Recommended Order did not address the issue of the conservation of water resources. First, as explained above, the amount of the proposed appropriation exceeds the annual recharge of the aquifer and will thus result in the “mining” of the Willow Creek aquifer. This, in and of itself, is contrary to the conservation of water resources. Second, as raised at the hearing and in Protestants’ Post-Hearing Brief, SunCor has applied for a total of 10 cfs despite the fact that it claims to only need approximately 2.3 cfs to meet the needs of the Avimor planned community’s “core area.” *See Protestants’ Post-Hearing Brief*, p. 12. Such excessive

appropriation of water is contrary to the conservation of water resources within the state of Idaho.

Despite its findings that the amount of water available in the Willow Creek aquifer is unknown and that the amount of diversion will greatly exceed the amount of recharge, the Recommended Order does not reject the permit or partially approve and grant the permit for a smaller quantity of water than applied for. Nor do the conditions placed upon the permit – which merely address for what purpose the diverted water can be used for - in any way address these issues because the water right is granted for the full amount requested. *See Recommended Order, p. 10, Conclusion of Law #9; see also Id., p. 13, Order # 11.*

II. THE RECOMMENDED ORDER ERRONEOUSLY CONCLUDES THAT THE APPLICATION DOES NOT CONFLICT WITH THE LOCAL PUBLIC INTEREST.

A. The Limitations Placed on the Permit Application Does Not Address the Identified Conflict With the Local Public Interest.

The Recommended Order states that “IDWR has the authority,...in considering the local public interest and conservation of water of the state of Idaho, to limit the use of water if the supply of water is finite, and there are significant anticipated uses of the finite resources in the near future.” *Recommended Order, p. 11.* The Recommended Order further concludes that “[i]t would not be in the local public interest to allow a single large development entity to hold water rights to a significant portion of a limited public resource that may be needed to supply the culinary and potable water needs of future anticipated development.” *Recommended Order, p. 10, Conclusion of Law #9.* This conclusion is based on the finding that there is significant additional residential development proposed in the vicinity of SunCor’s proposed development, that the amount of recharge is unknown because the area where water is proposed to be appropriated is “hydrologically unexplored” and potential sources of significant recharge are

remote from the area where ground water is sought to be appropriated. *Id.*, *Conclusion of Law* #8; see also *Id.*, p. 8, *Finding of Fact* # 22.

In an attempt to make the application comply with the local public interest requirement, the Hearing Officer attached one limitation to the water right. See *Recommended Order*, p. 10, *Conclusions of Law* #s 9, 10; see also *Id.*, p. 13, *Order* #s 11. This limitation is that “[c]ommon areas, parks, schools, grounds, golf courses, and any other large parcels may only be irrigated under this water right with wastewater that has been previously beneficially used for potable or culinary purposes, has been treated in a wastewater treatment plant, and is delivered from the wastewater treatment plant to the parcel to be irrigated.” *Recommended Order*, p. 13, *Order* # 11.

Yet, as stated above, this limitation in no way addresses the local public interest concern raised by in the Recommended Order because it does not limit the amount of water that can be diverted from the Willow Creek aquifer – that amount remains at the applied for five cfs. Thus, the application still conflicts with the local public interest because a single large development entity (SunCor) will still be allowed to hold water rights to a significant portion of a limited public resource (10 cfs total water diversions) that may be needed to supply the culinary and potable water needs of future anticipated development.

B. The Recommended Order Does Not Address Other Issues Protestants’ Identified as Conflicting with the Local Public Interest.

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wholly unknown and unstudied impact that the water withdrawal may have on the geothermal resource of the Willow Creek aquifer; the impact of the water diversion and use on native wildlife, birds and sensitive plants; and the need for a detailed hydrological study of the water resources in the area prior to the approval of additional municipal and other water right permit applications. *Id.* Nowhere does the Recommended Order address these impacts, which are directly relevant to the local public interest. As the legislative history of the 2003 amendment to the local public interest test states: “Water Resources should consider all locally important factors affecting the public water resources, including but not limited to fish and wildlife habitat, aquatic life, recreation, aesthetic beauty, transportation, navigation, water quality and the effects of such use on the availability of water for alternative uses of water that might be made within a reasonable time.” *Statement of Purpose, H.B. 284 (2003)*.

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Thus, because the application is proposed solely for the purposes of aquifer storage and recovery and ground water recharge of the Spring Valley aquifer, it does not meet the definition

of “municipal purposes” and thus SunCor does not qualify as a municipal provider for the purpose of this water right application.

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Protestants’ post-hearing briefs raised the issue of the Department’s arbitrary determination to ignore the requirement of Idaho Code § 42-202(2) that a municipal provider submit sufficient information and documentation with its application to establish that it qualifies as a municipal provider, and that its relatively new “policy” of allowing a purported municipal provider to postpone submitting the required information for five years – until it submits proof of beneficial use – violates the plain language of the statute. *Protestants’ Post-Hearing Brief*, pp. 15-17. Nowhere does the Recommended Order address this issue. Protestants thus renew these claims here.

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showing that signing a prior permit of the applicant on behalf of the Director of IDWR constitutes bias of the hearing officer.” *Recommended Order*, p. 1.

In their Post-Hearing Brief, Protestants requested that the Hearing Officer reconsider its order denying Protestants’ Motion based on the testimony at the hearing that the Hearing Officer was the one who approved the unofficial - and unlawful - “policy” of allowing a purported municipal provider to postpone submitting the required information and documentation. *Protestants’ Post-Hearing Brief*, pp. 15-16. The Recommended Order does not address this specific request for reconsideration, and does not discuss the demonstrated bias of the Hearing Officer based on the testimony at the hearing.

B. SunCor Did Not Meet its Burden to Demonstrate That its’ Application was Made In Good Faith, and is Not Made for Delay or Speculative Purposes.

The Recommended Order also does not address Protestants’ claim that SunCor did not meet its burden that its application is made in good faith, and is not made for delay or speculative purposes. *See Protestants’ Post-Hearing Brief*, pp. 7-8. As explained in its post hearing briefs, SunCor asserts that it will use only 2.3 cfs for the entire “core area” of the Avimor planned community. Yet, if the Department approves this application, SunCor will have two water right permits totaling 10 cfs – far exceeding its stated need. SunCor itself claimed that its permit application did not include reasonably anticipated future needs or a planning horizon, yet it has not explained how and when it will use the excess 7.7 cfs. SunCor’s permit application for a water right in such excess of its stated need is both bad faith and speculation, and further does not satisfy the requirement that an appropriation of water must be for a beneficial use

The Recommended Order merely concludes that the application was made in good faith and not for delay or speculative purposes, without providing any findings of fact or explanation for this conclusion. *Recommended Order*, p. 10, *Conclusion of Law* # 6.

CONCLUSION

For the foregoing reasons, Protestants respectfully petition for reconsideration of the Recommended Order.

Dated this 27th day of March, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Judith M. Brawer', written over a horizontal line.

Judith M. Brawer
Counsel for Protestants' Davidson,
Mullins and Baldwin

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March 2007, I caused a true and correct copy of the foregoing PROTESTANTS' PETITION FOR RECONSIDERATION to be served on the following persons:

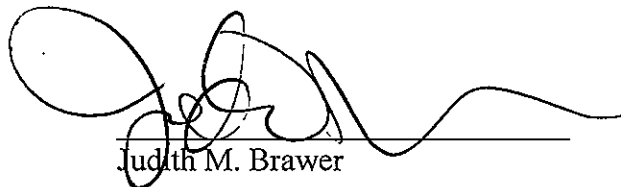
Via hand deliver:

Glen Saxton, Hearing Officer
C/o Debbie Gibson
IDWR
322 E. Front Street
Boise, ID 83702

Via first class mail postage pre-paid

Albert P. Barker
BARKER ROSHOLT & SIMPSON
1010 W. Jefferson
Boise, Idaho 83701-2139

Phillip Fry
4122 Homer Road
Eagle, ID 83616



Judith M. Brawer



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

JAMES E. RISCH
Governor

KARL J. DREHER
Director

March 13, 2007

SUNCOR IDAHO LLC
C/O ALBERT P BARKER
BARKER ROSHOLT & SIMPSON
PO BOX 2139
BOISE ID 83701-2139

ROD DAVIDSON
GARTH BALDWIN
LYLE MULLINS
C/O JUDITH BRAWER
1502 N 7TH ST
BOISE ID 83702

PHILLIP FRY
4122 HOMER RD
EAGLE ID 83616

Re: Application for Permit No. 63-32061 in the name of SunCor Idaho, LLC.

Dear Parties:

Enclosed please find a **Recommended Order** for the above-referenced matter, also enclosed is an explanatory information sheet regarding your rights and deadlines available to you if you oppose this decision.

Please note that water right owners are required to report any change of water right ownership and/or change of mailing address or name change to the department within 120 days of the change. Contact any office of the department or the department's website to obtain the proper reporting form. The department's website address and the location of water right forms is:

http://www.idwr.idaho.gov/water/rights/water_rights_forms.htm

If you have any questions, please call me at (208) 287-4942.

Sincerely,

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau

Enclosures

c: IDWR - Regional Office

**EXPLANATORY INFORMATION
TO ACCOMPANY A
RECOMMENDED ORDER**

(Required by Rule of Procedure 720.02)

The accompanying order is a "**Recommended Order**" issued by the department pursuant to Section 67-5243, Idaho Code. The provisions of this order will not become effective until the Director issues a final order in this matter.

Each party to these proceedings who appeared at the hearing may file a petition for reconsideration, briefs and exceptions to the recommended order and may request oral argument before the Director of the department as further described below:

PETITION FOR RECONSIDERATION

Any party may file a petition for reconsideration of a recommended order with the hearing officer issuing the order within fourteen (14) days of the service date of the order as shown on the certificate of service. **Note: the petition must be received by the Department within this fourteen (14) day period.** The hearing officer will act on a petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.

EXCEPTIONS AND BRIEFS

Within fourteen (14) days after (a) the service date of this recommended order, (b) the service date of a denial of a petition for reconsideration from this recommended order, or (c) the failure within twenty-one (21) days to grant or deny a petition for reconsideration from this recommended order, any party may in writing support or take exceptions to any part of a recommended order and may file briefs in support of the party's position on any issue in the proceeding. Written briefs in support of or taking exceptions to the recommended order shall be filed with the Director. Opposing parties shall have twenty-one (21) days to respond.

ORAL ARGUMENT

The Director may schedule oral argument in the matter before issuing a final order. Oral argument on exceptions to a recommended order shall be heard at the discretion of the Director. If oral arguments are to be heard, the Director will, within a reasonable time, notify each party of the place, date and hour for the argument of the case. Unless the Director orders otherwise, all oral arguments will be heard in Boise, Idaho.

CERTIFICATE OF SERVICE

Any petition for reconsideration or other motion to the hearing officer shall be served upon all other parties to the proceeding. All exceptions, briefs, requests for oral argument and any other matters filed with the Director in connection with the recommended order shall be served on all other parties to these proceedings in accordance with Rules of Procedure 302 and 303.

FINAL ORDER

The Director will issue a final order within fifty-six (56) days of receipt of the written briefs, oral argument or response to briefs, whichever is later, unless waived by the parties or for good cause shown. The agency may remand the matter for further evidentiary hearings if further factual development of the record is necessary before issuing a final order. The department will serve a copy of the final order on all parties of record.

APPEAL OF FINAL ORDER TO DISTRICT COURT

A party aggrieved by a final order of the Director is entitled to judicial review in compliance with sections 67-5271 through 67-5279, Idaho Code.



State of Idaho

DEPARTMENT OF WATER RESOURCES

322 East Front Street, P.O. Box 83720, Boise, ID 83720-0098

Phone: (208) 287-4800 Fax: (208) 287-6700 Web Site: www.idwr.idaho.gov

November 8, 2006

JAMES E. RISCH
Governor

KARL J. DREHER
Director

HAND DELIVERED

CUSTOM RECORDING AND SOUND
3907 CUSTER ST.
BOISE ID

Dear Don or Amy,

I am sending you seven cassette tapes from a hearing the Department recently held, and request that you copy these cassettes onto CDs in MP3 format. I believe the tape speed is 2.4, and they are recorded with 4 tracks on both sides of the tape. The length of the hearing was approximately 16 hours. I understand that the cost for this is \$15.00 per hour. Therefore, an approximate cost of \$240.00 plus the cost of two sets of CDs will be about \$246.00. I suggest that you contact the two parties requesting these copies, their names and phone numbers are: Judith Brawer at 871-0596, and Chris Pearce or Albert Barker at 336-0700. They will be responsible for picking up and each paying one half of the bill for your service. The department will need the original cassettes returned and does not require a copy of the CDs.

I understand you require 48 hours to complete this transfer of information. If you have any difficulties, please contact me immediately, otherwise the parties are expecting their CD(s) by Friday, November 10th approximately before 5:00 p.m.

Please call me at 287-4942 when you are finished and I will arrange for someone to pick up the tapes. Thank you for your help.

Sincerely,

A handwritten signature in black ink that reads 'Deborah J. Gibson'. The signature is written in a cursive, flowing style.

Deborah J. Gibson
Administrative Assistant
Water Allocation Bureau